





THE LAW OF ESTOPPEL.

BY HENRY M. HERMAN,
Attorney and Counsellor-at-law.

“ITA LEX SCRIPTA EST.”

“WE MUST BE CONTENT WITH THE LAW AS IT STANDS, WITHOUT ENQUIRING INTO
ITS REASONS.”

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IS RESPECTFULLY DEDICATED
BY THE AUTHOR,
TO THE
HON. JOHN F. DILLON,
UNITED STATES CIRCUIT JUDGE
FOR THE
EIGHTH CIRCUIT.

237250

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PREFACE.

THE Author in his practice has often felt the necessity of a work embracing as fully as possible, the law on the subject of ESTOPPEL. No work has been published in which the subject is fully treated, and with the exception of the able review in Smith's Leading Cases, the law is to be found scattered through the text books and reports. It has been his aim to gather the decisions and rules, laid down by the various courts in England and America, and to give the law in a concise, comprehensive and practicable form. In doing so he has endeavored to treat separately, the several subjects to which estoppels peculiarly apply, such as judgments *in rem.*; *in personam*, or *inter partes*; proceedings *in rem.*; of courts of superior and inferior jurisdiction; by deeds; landlord and tenant; mortgages; corporations, etc.

The writer has substantially laid down the settled rules and principles which have been applied to a doctrine of the law which once served as a species of judicial tyranny, but which has, by modern innovation, become a branch of the jurisprudence of all nations.

The work originated in a conviction that the labor of every member of the Profession would be materially lessened by an attempt, however imperfect, to collect and reduce into system the decisions on this important branch of the law. The writer has aimed to show what an *Estoppel is and how it is made effectual*, and has not intended to show what is not an Estoppel, or when it could not be applied.

Where the principles laid down are firmly established in the jurisprudence of both continents, he has not deemed it necessary to cite authorities, and has cited only sufficient to show where the principles and rules have been applied as stated in this work. Should it render the arduous labors of the Profession lighter and pleasanter, the Author will feel amply rewarded for his labor.

ESTOPPEL.

THE LAW OF ESTOPPEL.

CHAPTER I.

THE ORIGIN, NATURE, AND OBJECT OF ESTOPPELS.

SECTION 1. There are but few older principles or rules of law that have been handed down from generation to generation, from the earliest days of the Roman law to the present time, than that of Estoppel. The term estoppel is derived from the French word *estoupe*, whence the English word stopped, and it is called an estoppel, or conclusion, because a man's own act or acceptance stoppeth or closeth up his mouth to allege or plead the truth. Conclusion is derived from the verb *concludo*, which is derived from *con* and *cludo*, to determine, to finish, to shut up, to estop, to bar a man, to plead or claim anything; it signifies literally the winding up of all arguments and reasoning.

§ 2. Touching estoppels, says Lord Coke, which are a curious and excellent kind of learning, it is to be observed there are three kinds of estoppels: BY MATTER OF RECORD; BY MATTER IN WRITING; AND BY MATTER IN PAIS; and although Coke uses the word writing, it is clearly evident that the writing which will operate as an estoppel must be a deed. Estoppels therefore are:

1. BY MATTER OF RECORD;
2. BY DEED;
3. IN PAIS.

§ 3. A man is said to be estopped when he has done some act which the policy of the law will not permit him to gain-say or deny. An estoppel is when a man is concluded by his own act. An estoppel is an obstruction or bar to one's alleging or denying a fact contrary to his own previous action, allegation or denial. A conclusion or admission which

cannot be controverted. A man shall always be estopped by his own deed, or not permitted to aver or prove anything in contradiction to what he has once solemnly avowed. Estoppels signify that a man for the sake of good faith and fair dealing, should be estopped for saying that to be false, which by his means has once been accredited for truth, and by his representations has led others to act. The very meaning of estoppel is when an admission is intended to lead and does lead a man with whom a party is dealing into a line of conduct which must be prejudicial to his interest, unless the party estopped be cut off from the power of retraction. An estoppel affecting the right of a party in real estate, may be created by matter *in pais*, consisting of acts and declarations of a person by which he designedly induces another to alter his position, injuriously to himself; as for instance, if a person with full knowledge, permits another without objection, to sell his property as the property of the vendor, he will be estopped from questioning the title of a *bona fide* purchaser; and where one has a secret title or trust or interest in property, and permits one to expend money on the property, he is estopped from questioning the title. But a party is not estopped by an admission or assertion of a conclusion of law upon undisputed facts.¹

§ 4. Where one, by his words or conduct, wilfully causes another to believe in the existence of a certain state of things, and induces him to act on that belief, or to alter his own previous position. The former is estopped from averring against the latter a different state of things as existing at the same time. By the term wilfully, it must be understood, if not that the party represents that to be true, which he knows to be untrue; at least, that he means his representation is to be relied and acted upon accordingly, yet generally without regard to intention; if the party so conducts himself as to deceive a reasonable man to his prejudice, he will be estopped from asserting the truth. As every man is bound to act and speak according to the truth of the case, the law presumes he has done so, and will not allow him to

¹ Brewster v. Striker, 2 N. Y. 19.

contradict so reasonable a presumption. This is the foundation of the doctrine of estoppels. The truth is deemed to be shown by what estops.

§ 5. An estoppel is, therefore, an admission, or ~~something~~ which the law treats as an admission of an extremely high and conclusive nature, so high and so conclusive that the party whom it affects is not allowed to aver against it or offer evidence to controvert it. Though it may be shown that the party relying upon it is estopped from setting it up, since this would not be to deny its conclusive effect as to himself, but to incapacitate the other from taking advantage of it. Such being the general nature of an estoppel, it matters not what the fact thereby admitted may be, or what would be the ordinary or primary evidence of that fact, whether by matter of record or speciality of writing, unsealed or mere parol. The fact may, in such case, be proved, the ordinary evidence rendered unnecessary by an estoppel; and this is no infringement on the rule of law requiring the best evidence to be produced, and forbidding secondary evidence to be produced, until the sources of primary evidence be exhausted, for the estoppel professes not to supply the absence of the ordinary instruments of evidence, but to supercede the necessity of any evidence by showing that the fact is already admitted. An estoppel is an imperative and absolute presumption of law determining the quantity of evidence requisite for the support of any particular averment, which is not permitted to be overcome by any proof that the fact is otherwise; it forbids and dispenses with any ulterior inquiry. Estoppels have been adopted by common consent, from motives of public policy, for the sake of greater certainty, and the promotion of peace and quiet in the community; and therefore is it that all corroborating evidence is dispensed with and all opposing evidence is forbidden.

§ 6. An admission, which is in the same nature as an estoppel, though not so high in degree, may be allowed to establish facts, which, were it not for the admission, must be proved by certain steps appropriated by law to that purpose; as for example, a recital in a deed stated, that the

deed was executed in pursuance of a power contained in a certain will. A will, purporting to have been the will under which the deed was made, was introduced, and there was some slight evidence that, that was the will mentioned in the deed, and it was held that this was sufficient evidence to go to the jury without calling the attesting witnesses. In deciding this case, Chief Justice Tyndal said, "he did not put the admissions as high as an estoppel, but it has its effect on this principle, where a party executing a deed was held estopped by the recital of a particular fact in that deed to deny or controvert that fact."¹

§ 7. Notwithstanding the unpromising definition of the term estoppel, the doctrine is in no wise unjust or unreasonable, but on the contrary, it is reasonable and just in the highest degree, that the law should provide for some solemn mode of declaration in order that men may bind themselves to the good faith and truth of representations on which other persons are to act. *Interest reipublicae ut sit finis litium*, is an old maxim deeply fixed in the law of fundamentals; that it concerns the state that there be an end of litigation. This maxim has a wide application; it, in fact, embraces the whole doctrine of estoppels; a doctrine which is obviously founded on common sense and sound policy. For if matters which have been once solemnly decided are to be again drawn into controversy; if facts, once solemnly affirmed, are to be again denied whenever the affirmant sees his opportunity, there can never be an end of litigation and confusion. It is wise and just, therefore, to provide certain means by which a man may be estopped or concluded—not from saying the truth—but from saying that, which by the intervention of himself, has once become accredited for truth, is false. And, in all probability, no Code, however rude it might have been, ever existed without some such provision for the security of men, acting as all men must, upon the representations of others.

¹ *Bringle v. Goodson*, 1 Bing. N. C. 739; *Shelly v. Wright*, Willes, 9; *Satterlee v. Pooley*, 6 M. & W. 664; *Newhall v. Holt*, ib. 662; *Fox v. Waters*, 12 A. & E. 43; *Marchioness of Annandale v. Harris*, 2 P. Wms. 432; *Mayor of Carlisle v. Blamire*, 8 East. 487; *Carver v. Jackson*, 4 Peters. 1.

§ 8. The reasons why estoppels are allowed, seem to be : First, no man ought to be allowed to allege anything but the truth for his defence, and what he has once alleged is presumed to be true, and therefore he ought not to be permitted to contradict it. It is said in the second instance, "*Allegans contraria non est audiendus.*" He is not to be heard who alleges things contradictory to each other. Secondly, as the law cannot be known until the facts are ascertained, so neither can the truth of them be found out from the evidence ; and it is reasonable that some evidence should be allowed of so high a nature as to admit of no contradictory proof.

§ 9. The law of estoppel is not so unjust or absurd as it has been too much the custom to represent. Its foundation is laid in the obligation which every man is under to speak and act according to the truth of the case, and in the policy of the law to prevent the great mischiefs resulting from uncertainty and want of confidence in the intercourse of men, if they were permitted to deny that which they have solemnly and deliberately asserted and received as true. The doctrine of estoppel has been guarded with great strictness, not because the party enforcing it wishes to exclude the truth, but it is to be supposed that, that is true which the opposite party has already recited ; but because the estoppel may exclude the truth, and for this reason estoppels must be certain to every intent ; *for no one shall be denied setting up the truth, unless it is in plain and clear contradiction to his former allegations and acts.* The doctrine of estoppel is both equitable and legal, and will be applied by courts, both of law and equity, in all proper cases upon well ascertained facts and between the proper parties. Courts of equity will disregard the principles of estoppel in those cases where it becomes necessary to prevent injustice only through mistake, accident or fraud.

§ 10. Estoppels are sometimes said to be odious and not favored in law ; and it has also been said that there is no equitable estoppel. But the doctrine of election, which prevents a party from claiming repugnant rights, and which has been so advantageously introduced into courts of equity,

is manifestly an extension of this principle. In courts of law, they are for the most part reconcilable to the purest morality; and when they produce neither hardship nor injustice, they merit indulgence if not favor. The conclusiveness of judgments, which conduces so essentially to peace and repose, has no other foundation. This doctrine of estoppel may debar the truth in a particular case, and is therefore not unfrequently in such cases declared odious. Still it must be remembered that it debars it only when its utterance would convict the party of previous falsehood, or would be a denial of a previous representation, on the faith of which other persons have dealt or pledged their credit, or expended their money. It is a doctrine, therefore, when properly understood and applied, that estops the truth in order to prevent fraud and falsehood; and imposes silence only when the party should not, in conscience and honesty be allowed to speak. And it is now one of the well settled principles of law, both in foreign countries and our own, that estoppels are favorably looked upon by the courts as tending, when properly construed and applied, to uphold the purpose of agreements and prevent and suppress fraud and injustice.¹

§ 11. Their technicality will accordingly be restrained, their true meaning adduced and applied, and they may even be raised by implication in aid of persons who have acted on faith, of a declaration to which they were originally strangers, and which was not meant to be conclusive in their behalf. The office of estoppels at law is like that of injunctions in equity, to preclude rights that cannot be asserted consistently with good faith and justice, and prevent wrongs for which there might be no adequate remedy.² And they should, consequently, when the circumstances will permit, be so construed and moulded as to not deviate from their object; and in those cases where estoppels are said to be

¹ Waters' Appeal, 35 Penn. 522; ² Van Rensselaer v. Kearny, 11 How.
Bocock v. Paver, 8 Ohio St. 280; 297.
Van Rensselaer v. Kearny, 11 How.
297; Den v. Doe, 8 Ind. 495; Les-
see of Buckingham v. Hanna, 2
Ohio, 551.

odious or not favored, should be understood to be only where the technicality of the estoppel cannot be subservient to its equity. As for an example, in the case of the *S. E. R. W. Co. v. Warton*, in a comprehensive declaration, ~~in an~~ agreement to be referred to arbitrators, the parties had settled, adjusted, and mutually satisfied every other claim and demand which they had against each other, arising in any account, matter or thing whatsoever; yet this was held not to be an estoppel to a cause of action arising prior to the agreement, because the intention, as indicated by the tenor of the agreement, was to make the settlement only for the purpose of reference.¹ But where a deed contains a recital of a particular fact, in express terms, the effect of the recital cannot be got rid of by showing what the intention of the parties was.

§ 12. But where the language is general, the intention may be collected from the whole deed. But when a *particular clause* is of such a nature that it cannot stand without invalidating the whole instrument, it may, in such a case, be shown to be false and rejected altogether.² A deed containing a recital that a *feme sole* is covert, will not preclude either party from proving that she is a *feme sole*, in order to support the grant.³ In the earlier history of the law, the doctrine of estoppels was more harshly and vigorously enforced; in fact, it was a species of legal tyranny, by means of which the intervention of an estoppel excluded the truth in many cases where justice and equity required its admission, and it often became a preposterous and absurd defence. The courts of modern times have, however, modified the doctrine, and application of estoppels to consistency and in accordance with the law of common sense and justice, and courts will be found to have been somewhat astute to reconcile the harsh doctrines of the earlier law with the substantial truth and justice of the cause.⁴ An

¹ 6 Hurst. & N. 520.

² *Doe v. Carew*, 2 Q. B. 317; *Worthington v. Hilyer*, 4 Mass. 196; *Proctor v. Pool*, 4 Dev. 370; *United States v. King*, 3 How. 773.

³ *Young v. Raincock*, 7 C. B. 310; *Viner Abrig. Estoppel*, M. 8, Pl. 3; *Brinegar v. Chaffin*, 3 Dev. 108.

⁴ *Den v. Camp*, 4 Harr. 148.

estoppel, in the words of Lord Coke, is where a man, by his own act or acceptance, is concluded to say the truth, and generally arises from some precise and positive allegation, made under circumstances which preclude the right and power of contradiction. So a party, which doubtfully alleging a fact, or even asserts its existence, agrees to be bound by it whether it exists or not, will be as much estopped from relying on it subsequently, as a defence to the contract, as if there had been a recital or stipulation expressly denying that which he seeks to establish. The evidence under these circumstances is shut out—not because it is inconsistent with the deed or false—but as being, by the terms of the agreement, irrelevant to the decision of the case before the court.¹ So the estoppel of a compromise rests on the same basis and may arise without a seal. As an illustration of this principle, the following case may be cited: An agreement made with a patentee to manufacture his machines upon certain conditions, and making and selling such machines under the patentee's title, estops the manufacturer from alleging the invalidity of the patent as a defence to an action by the patentee for an account under the contract.² Where a remedy is by action, an executory agreement; as for example, not to convey or sue, does not operate as an estoppel.³ But when such an agreement is intended to give force and effect to a present transfer and covenants of warranty for quiet enjoyment, or for a future assurance, not only precludes the covenantor from disputing the title he has conveyed, but from asserting any other that he may subsequently acquire.⁴

§ 13. The effect of an estoppel, whether legal or equitable, is the exclusion of evidence, and its existence must always be a question of law for the court and not of fact

¹ *Temple v. Partridge*, 42 Maine. 56; *Jackson v. Waldron*, 13 Wend. 178; *Wightman v. Reynolds*, 24 Miss. 675; *Goodrich v. Bryant*, 5 Sneed. 325; *Heilner v. Battin*, 27 Penn. 517; *Hills v. Lansing*, 24 Eng. L. & E. 432.

² *Kingsman v. Parkhurst*, 18 How. 289; affirming S. C. 1 Blatchford, C. C. R. 488; *Heilner v. Battin*, 27 Penn. 517.

³ *Gibson v. Gibson*, 15 Mass. 106.

⁴ *Somes v. Skinner*, 3 Pick. 52; *Fairbank v. Williamson*, 7 Greenl. 96.

for the jury. Estoppels, whether claimed as of record or *in pais*, must be such within the principles which gives them force before they will be effectual. An estoppel may be used as a defence against a party who is thus precluded from his act or statement from maintaining his action; or it may be used by the plaintiff to prevent or avoid a defence which is open to a similar objection. This doctrine at law gives rise to a kind of pleading that is neither by way of traverse, nor confession or avoidance, viz: a pleading, that waiving any question of fact, relies merely on the estoppel, and after stating the previous act, allegation or denial of the opposite party, prays judgment if he shall be received or admitted to aver contrary to what he before said or did. This is a pleading by way of an estoppel.

§ 14. As we have now ascertained what an estoppel is and from whence it originated, we will now ascertain its operation and effect as a defence which is at once final and conclusive; and as we have already seen the number and kinds of estoppels, we will proceed now to treat of them in order, viz:

I. ESTOPPEL BY RECORD;

II. ESTOPPEL BY DEED OR WRITING;

III. ESTOPPEL IN PAIS, OR EQUITABLE ESTOPPEL;

showing how they are used as against parties and things, whom they bind or estop, and in what their conclusiveness consists.

CHAPTER II.

ESTOPPEL BY RECORD.

SECTION 15. Records are the memorials of the proceedings of legislative bodies and of the king's courts of justice in England, preserved in rolls of parchment, and they are considered of such authority that no evidence is allowed to contradict them. In the ancient practice all court records were written in latin, on parchment, and contained all the proceedings in a cause, from the filing of the petition or declaration to the final decision or judgment; they were accurate transcripts of all the proceedings, papers and process in the action, but there have been great innovations in this practice, and they are now written in the English language and are not as full and complete as they were in olden times, but their authority has not been lessened to any great extent. A record is, therefore, a written memorial made by a public officer authorized by law to perform that function, and intended to serve as evidence of something written, said or done, and may be divided into three classes. First, those which relate to legislative proceedings; second, the courts of common law, the courts of chancery, and those which are made so by statutory provision; a record imports such absolute verity that no person, against whom it is admissible, shall be allowed to aver against it.¹ And upon this point the law is well settled that a party cannot be allowed or received to aver against it.² As an instance of the conclusiveness of a record, the case of the *King v. Carlisle*,³ may be cited. There the defendant had been convicted of a crime, and brought error to an appellate court, assigning as error that there was but one judge on the bench when there should have been more at the time of the trial. The record was made up in the ordinary way, showing that the court

¹ Co. Litt, 260 a. Gilbert Ev. 5; Glyn v. Thorp, 1 B. & A. 156. ² King v. Carlisle, 2 B. & A. 362.
³ 2 B. & Ad. 362.

below had regularly entered judgment against him. The appellate court, Lord Tenterden delivering the opinion, held that a record imports such absolute verity that a party could not aver as error in fact a matter contrary to that record; while in the first, Justice Coke says: The rolls or memorials of the judges of the courts of record import in them such uncontrollable credit and verity as to admit of no averment, plea or proof to the contrary; and if such a record be alleged and it be pleaded *nul tiel record*, it shall be tried only by itself; for otherwise there should never be an end of litigation. Numerous cases are found which conclusively settle this principle of law.

§ 16. Judgments and verdicts of courts are always of record. They have, therefore, the character which belongs to all records, that they cannot be contradicted by evidence.¹

Where a judgment is produced in which the record shows that there were several issues, the opposite party will not be allowed to aver that there was no evidence offered on one of the issues, or that the judgment as to that issue was entered by mistake.²

§ 17. If there were no limitations to this conclusive effect of records, courts of justice would become tyrannical inquisitions, inflicting, under the guise of justice, great hardships, wrong and oppression, by enforcing what might be termed edicts, surpassing all record of ancient tyranny and injustice, upon parties in no ways interested in the matter in dispute, which had been adjudged and finally concluded. There are, therefore, certain principles and considerations by which the conclusive effect of records are limited, laid down by Lord Coke and other eminent jurists.

§ 18. 1. *Where the record is coram non iudice.* Where a court has no jurisdiction over the person, the cause or the process, as where an indictment purports to have been determined in a civil tribunal having no criminal jurisdiction.

2. *Where the truth appears in the same record.* As where a defendant is sued by a wrong name, and enters into a bail

¹ 2 Phil. Ev. 2.

² Reed v. Jackson, 1 East, 355.

bond Prout the writ, as he must and then puts in bail by his right name; he who was arrested is not estopped from pleading in abatement, or where the record shows that the judgment relied on as an estoppel has been reversed in error.

3. *Where the matter alleged is consistent with the record.* A man is not estopped to aver a thing consistent with the record; as if A. B. senior, and A. B. junior, are bound by an obligation, it may be averred that A. B. junior, was intended.

4. *Where the allegation of the record is uncertain.* For an estoppel, not being favored by the law, ought to be certain to every intent, and not be taken by argument or inference; it ought to be a precise affirmation of that which makes the estoppel, as if it be said, *ut dicitur quia in personalitas, non concludet nec leget impersonal dicitur, quia sine persona*, and therefore if a thing be not directly and precisely alleged it shall be no estoppel.

5. *Or is alleged merely by way of supposal.* In the words of Lord Coke: "Matter alleged by way of supposal shall not conclude after nonsuit; otherwise after judgment, and after nonsuit, notwithstanding the supposal in the count, shall not conclude, yet bar the title, replication, or other pleading, which is precisely alleged, shall conclude after nonsuit—and hereby are the books reconciled."

6. *If not traversable or material.* Where matter is neither traversable or material, it shall not estop, as for example: the day in an indictment, or a description of the nature of land in a lease, or as in a debt upon an obligation alleged to be made in A., in another action upon the same obligation, he may say it was made in B.

7. *Estoppels ought to be reciprocal or mutual, that is to bind both parties;* and this is the reason that strangers shall not take advantage of nor be bound by an estoppel.

8. *Where there is an estoppel against an estoppel.* In the words of Coke: "An estoppel against an estoppel setteth the matter at large, as a warranty against a warranty."

9. *There is no estoppel where an interest passes.* By which is meant that a grantee is not estopped from saying that a grant does not pass so great an interest as it purports to

convey, though he is estopped from saying that it passes no interest at all.

§ 19. But the principal limitation to the conclusive effect of a record, is that arising from the consideration, that, in most cases, it is not binding, or even evidence between all persons. Questions of this sort generally arise on *judgments*, they being by far the most extensive species of records.¹

§ 20. A judgment, sentence or decree is a judicial determination of a cause agitated between real parties, upon which a real interest has been settled. In order to make a judgment, sentence or decree, there must be a real interest, a real argument, a real prosecution, a real defence, a real decision. Of all these requisites not one takes place in the case of a fraudulent and collusive suit. There is no judge; but a person, invested with the ensigns of a judicial office, is misemployed in listening to a fictitious cause proposed to him; there is no party litigating, there is no party defendant, no real interest brought into question. It is the decision or sentence of the law, which is pronounced by a judge or court upon matters contained in the record of an action which has been prosecuted or litigated before such judge or court; and the final proceeding in an action at law, by which the court applies the law to the particular case presented before it, and specifically grants or denies to the plaintiff the remedy which he has sought by the action; and if the defendant sets up a claim by way of affirmative relief, claim, or defence, such right is also determined and declared. In every action which is prosecuted to its final termination, the litigant parties present to the court the facts and agreements to be considered, and the points of law to be resolved; and the judgment is the result of a full determination of all these matters, while the judge or court pronounces the decision, is the decision or sentence of the law, and the court or judge is the mere instrument in expressing the determination of the law.

§ 21. There are numerous legal questions that arise from the simple fact that there has been a judgment rendered in

¹ Smith's Leading Cases, 659.

an action by a court of competent jurisdiction. It may constitute part of a title, or be used to show that a controversy has been adjudicated, or as a means of letting in certain testimony used on a former trial, or in justification of proceedings in execution of the judgment, or to entitle a partner to contribution, or for any purpose to which a judgment is properly applicable, while a judgment against one man is generally no evidence against another. Yet, where A. sues B. for negligence as his agent, he can prove the consequences of the negligence to himself, by producing the record of a judgment against him by a third party; the record in such cases is evidence as to the amount of damages, but not as to the fact of the injury.¹

SEC. 22. According to the Roman Law as administered by the praetors, an action might be defended in any of the following modes:² 1st. By a simple denial or traverse of the facts alleged as the ground of action. 2d. By pleading new facts which constituted, *ipso jure*, a bar to the plaintiff's claim; although such claim might have been in the first instance, well founded as a payment or a release. 3d. By showing such facts as might induce the praetor, on equitable grounds, to declare certain defences admissible, the effect of which, if established, would be not, to destroy the action *ipso jure*, but to render it ineffectual by means of the "*exceptio*," thus specially prescribed by the praetor for the consideration of the judge, to whose final decision the action might be referred. *Exceptio* is, therefore, defined to be, *quasi quaedam exclusio quae opponi actioni cujusque rei solet, ad elidendum id quod, in intentionem consentionemve deductum est*,³ and according to Paulus: *Exceptio est conditio quae modo eximit reum damnatione, modo minuit condemnationem*.⁴ In the class of exceptions referred to was included the *exceptio rei judicata* from which the plea of judgment recovered or estoppel by record

¹ Green v. New River R. R. Co., 14 T. R. 590; Rex v. Hebden, Bullers N. P. 231; Pritchard v. Hitchcock, 6 M. and G. 151. ² Mackeldy's Civil Law, 407. ³ Brisson (ed cura Heinec.) Dig. 44, 1, 22, Pr.

in our law may be presumed to have derived its origin.¹ The *res judicata* was, in fact, a result of the definitive sentence, the decree of the judge, and was binding upon, and in general unimpeachable by the litigating parties; and was expressed by the familiar maxim, *res. adjudicata pro veritate accipitur*, which must be understood, to have applied only when the same question was once judicially decided, and was again raised between the same parties, the rule being *exceptionem rei judicatee ob stare quoties eadem questio inter eandem personas revocatur*.²

SEC. 23. The mode in which this particular exception was, in practice, made available under the Roman law, may be illustrated as follows: B. having no title to a horse, sells it to C. A. is the rightful owner of the horse and brings an action against C, who recovers a judgment against A. Afterwards C. loses the horse and A. obtains possession of it. C. brings an action against A. to recover possession of the horse. A. files an answer denying C.'s title to the horse. C. successfully estops A. from denying his title by pleading the *res adjudicata*, or former judgment between the same parties.

SEC. 24. The *exceptiones* which were unknown to the old Roman law, were introduced to mitigate its rigor by letting in defences which were not admissible or valid *stricti juris*; by long usage and custom these exceptions became established in such a manner as to be recognized by the *jus civile*, and ceasing to depend merely upon the will of the praetor, became in some measure compulsory upon him. In the civil law the plea of judgment recovered at once suggests itself as analogous to the *exceptio rei judicata* above mentioned, as directly founded on the fundamental principle of the law, "*nemo debet bis vexari, pro una eadem causa.*" With the rule of the civil law rightly understood, which, in the language of Ulpian, says: *res adjudicata pro veritate accipitur*. The law of England and America generally agrees.

SEC. 25. The sound reason of the rule cannot be better expressed, than Paulus, in the digest, thus lays it down: *Singulis controversiis, singulas actiones unamque, judicati finem*

¹ Phillimore Roman Laws, 43.

² Digest 42, 1 pr.; 3 Digest Civil Law, Dib. 44; Loc. 2, § 24.

*sufficere probabili ratione, placuit; ne aliter modus litium multiplicatus summam atque inexplicabilem faciat difficultatem, maxime, Si. diversa pronunciarentur.*¹

Other passages in the same division of the digest are to this effect; thus Ulpian says: "*Et generaliter, (ut Julianus definit) exceptio rei judicatae obstat quoties inter easdem personas eadem quaestio revocatur, vel alio genere judicii.*"²

Paulus says: "*Cum quaeritur, haec exceptio noceat necne? inspiciendum est an idem corpus sit.*"³ *Et an eadem causa petendi et eadem conditio personarum: quae nisi omnia concurrunt, alia res est.*"⁴ And again, "*Si quis interdicto egerit de possessione postea in rem agens non repellitur per exceptionem; quoniam in interdicto possessio, in actione proprietas vertitur,*" and Neratius, "*cum de hoc, an eadem res est, quaeritur, haec spectanda sunt; personae; id ipsum de quo agitur: causa proxima actionis: nec jam interest, qua ratione quis eam causam actionis competere sibi existimasset; perinde ac si quis, postea quam contra eum judicatum esset, nova instrumenta causae suae reperisset.*"⁵ Voet, in his commentary on this title says: "*Non aliter tamen huic exceptioni locus est, quam si lis terminata denuo moveatur inter easdem personas, de eadem re, et ex eadem petendi causa; sic ut, uno ex his tribus deficiente cesset. Eadem res intelligitur quoties apud judicem posteriorem id quaeritur quod apud priorem quaesitum est. Eadem petendi causa est etiam, licet non eadem agatur actione, sed alio judicii genere eadem quaestio ventiletur; cum eandem causam non tam actio faciat, quam potius origo petitionis. Qua ratione, cum propter rei emptae vitium tute, propter quod eam emptor empturus non fuisset, et redhibitorium et quanti minoris actio competere possit, sic ut actio, quanti minoris etiam redhibitionem tunc contineat. Julianio placuit eum qui, alterutra earum egerit, si altera, postea agat rei judicatae exceptione submovendum esse.*" Vinnius, in a note to the 13th title of the 4th book of the institutes upon the words "*per exceptionem rei judicatae,*" says: "*Quae ita agenti obstat si eadem quaes-*

¹ Digest, lib. 44, tit. 2 § 6.

² Digest, lib. 44, tit. 2, sec. 6.

³ Digest, lib. 44, tit. 2, sec. 12.

⁴ Digest, lib. 44, tit. 2, sec. 14.

⁵ Digest, lib. 44, tit. 2, sec. 27.

tio inter easdem revocetur, id est, si omnia sint eadem, idem corpus, eadem quantitas, idem jus, eadem causa petendi, eadem conditio personarum.

SEC. 26. If an action be brought and the merits of the question be discussed between the parties and a final judgment obtained by either, the parties are concluded and cannot canvass the same question again in another action, although, perhaps some objection or argument might have been urged upon the first trial which would have led to a different judgment. In such a case the matter in dispute having passed in *rem judicatum*, the former decision is conclusive between the parties if either attempts, by commencing another action to reopen the question.¹ A decision once made by the highest tribunal empowered to pass upon it, or a judgment rendered by a court of competent jurisdiction, that is having jurisdiction of the parties or thing adjudicated upon, which is unreversed or unannulled, is conclusive upon the parties to the controversy and their privies, and they are forever afterwards estopped or barred from reviving it in any new proceeding, for the purpose of the same or any other question passed upon in the former action. The matter in controversy, the cause of action has become definitely settled by judicial decision ; it is *res adjudicata*, and the judgment of the court imports absolute verity, whatever the question involved, whether it be the interpretation of a private contract, the legality of an individual act, or the validity of a legislative enactment, the rule of conclusiveness is the same. The controversy has been adjudicated, and once finally passed upon is never to be renewed.

SEC. 27. This rule of conclusiveness, this doctrine of estoppel, is one of the most inflexible principles of law, and has its foundation in this fundamental principle, "*interest republicae ut sit finis litium.*" When a cause of action is so far the same that a former judgment can be pleaded in bar, or when the matters in controversy in the suit can be shown by record evidence to have been examined and decided in another. There is every reason why that which has attained the high-

¹ Greathead v. Bromley, 7 T. R. 456 ; Bagot v. Williams, 3 B. & C., 235 ; Place v. Potts, 5 H. L. cas. 383.

est degree of certainty known to the law, should not again be litigated between the same parties ; for it concerns the peace and welfare of community that there should be an end to litigation. Justice requires that every cause should be once fairly tried, and the public tranquility demands that having been once so fairly tried, all litigation of that question between those parties should be concluded forever. Were it otherwise there would be no security for any person and great injustice might be done under color and pretence of law.¹ To ascertain the grounds and motives which may have led to the final determination of a question once settled by the jurisdiction to which the law has referred it, would be extremely dangerous, and it is better for the general administration of justice, that one individual should be inconvenienced than that the whole system of jurisprudence be overthrown and endless uncertainty introduced.²

SEC. 28. The effect of a judgment does not depend upon the reason given for it, or upon the circumstances that any were or were not given. If they were they may have covered portions of the controversy only, or they may have had such reference to facts peculiar to that case, that in any other controversy where the facts were somewhat similar and apparently resembling it in its legal bearings, serious doubts might arise whether it ought to fall within the same general principle. If one judgment is absolutely to conclude the parties to any similar controversy, we ought to know to a certainty almost that all the facts and questions of law upon which the former judgment was rendered, was substantially the same in the other controversy.

SEC. 29. The essential conditions under which the exception of the *res judicata* becomes applicable are the identity of the thing demanded, the identity of the cause of demand, and of the parties in the character in which they are litigants. Experience has disclosed that for the security of rights and the preservation of the repose of society, a limit must be imposed upon the facilities for litigation. For this purpose the presumption has been adopted that the thing adjudged

¹ 6 Schuman v. Weatherhead. ² 1 East, 2 Vin. abr. judgment, (M. a.) 541.

by a court of competent jurisdiction, under definite conditions, shall be received in evidence as irrefragable truth. This presumption is a guarantee of the future efficacy and binding operation of the judgment. It presupposes that all the constituents of the judgment shall be preserved by the court, which renders it in an authentic and unmistakable form. In the courts upon the continent of Europe, and in the courts of chancery and admiralty in the United States and Great Britain, where the function of adjudication is performed entire by a tribunal composed of one or more judges, this has been done without much difficulty. The separate functions of the judge and jury, in common law courts, created a necessity for separating issues of law from issues of fact; and with the increase of commerce and civilization, transactions have become more complicated and numerous, and law and fact have become more closely interwoven, so as to render their separation more embarrassing. The ancient system of pleading was more conclusive to the end of ascertaining the material issue between the parties, and the preservation in a permanent form of the evidence of the adjudication, has been condemned as requiring unnecessary precision, and subjecting parties to over technical rules, perplexity and expense. A system of general pleading has been extensively adopted in this country, which rendered it unnecessary that as between parties and privies the record should show that the question upon which the right of the plaintiff to recover, on the validity of the defence, depended for it to operate conclusively, but only that the same matter in controversy might have been litigated, and that extrinsic evidence would be admitted to prove that the particular question was material, and was in fact contested, and that it was referred to the decision of the jury.¹ In *Young v. Black*,² a record of a former suit between the same parties, was admitted in evidence in which judgment was rendered for the defendant, supported by parol proof that the cause of action in the two suits was the same.

The court said the controversy had passed *rem judicatum*;

¹ *W. S. Packet Co. v. Sickles*; 24 27 Cranch. 565.
Howard, 333.

and the identity of the causes of action being once established the law would not suffer them again to be drawn into question, and this seems to be the settled rule in this country ; and the supreme court decided that the record of a former suit between the parties, in which the declaration consisted of a special count, and the common money counts, and where there was a general verdict on the entire declaration, it cannot be given in evidence as an estoppel in a second suit founded on the special count, for the verdict may have been rendered on the common counts, and there is no variation from this rule, although after a verdict is rendered the court directs a judgment to be entered for the plaintiff on the first count in the declaration, it being the special count.¹ The estoppel of a judgment is limited in all cases to the points actually decided, but will not be less an estoppel to those points decided because it fails to go further, and hence while a judgment may be *evidence* and *conclusive evidence*, it may still not be available as an estoppel to a second action.

SEC. 30. The estoppel of a judgment covers the whole matter in dispute in the cause in which it is rendered, and to every point decided between the parties, in the course of the proceedings which led to the judgment. The judgment itself operates as a bar, and the decision of a particular issue as an estoppel ; but their conclusive effect is the same and depends upon the principle of *interest reipublicae ut sit finis litum*. In order to make a judgment effectual as an estoppel, the cause of action must be substantially the same ; it must be sustained by the same evidence, although the form of the action may be different. But the estoppel of an issue on a particular point, or of the judgment itself as to the point which it decides, will be conclusive as to the points in any subsequent proceeding, whether founded on the same or a different cause of action. At the old practice the course of pleading tended constantly to narrow the controversy between the parties to a single point of fact or law, which was exactly defined on the record and could not be subsequently questioned. But the course of modern practice requires little certainty of allegation or denial on the part of either plain-

¹ Wash. S. Packet Co. v. Sickles, 24 Howard. 333.

tiff or defendant, and renders it difficult to ascertain the subject matter of the controversy, and still more the precise points on which it was decided, by a mere inspection of the record. So that the nature of the question in dispute between the parties may be shown by parol evidence, as a matter of public policy, and thus brought within the estoppel of the judgment, and this may be done in regard to the particular points on which the decision of the question depended, whenever the circumstances are such that they cannot be ascertained with certainty.

SEC. 31. It is often the case that questions of constitutional law are decided in a private litigation in which the parties to the suit and all others, who after the litigation has ended, who acquire right under them in the subject matter of the controversy, are absolutely and forever estopped from renewing the question in respect to the matter then involved. So inflexible is this rule, that if another tribunal were to hold the judgment in that particular case erroneous, the old controversy could not be reopened in order that the final conclusion might be applied thereto.¹ As important principles of constitutional law may be disposed of in private actions, when private persons and their counsel alone are heard, it is *of some* importance to know to what extent other persons as well as the community at large may be affected by the decision.

And here it will be discovered that the fundamental principle of law, *res inter alios acta alteri nocere non debet* applies, and a judicial decision has no such force of absolute conclusiveness as to other parties as it possesses between the parties to the controversy in which the decision has been made, and those who have succeeded to their rights.

¹ Van Kleeck v. Eggleston, 7 Mich. 511; Newbury v. Trowbridge, 13 Mich. 278; Crandall v. James, 6 R. 1., 144; Babcock v. Camp, 12 Ohio, S. 11; Warner v. Scott, 39 Penn. St. 274; Kerr v. Union Bank, 18 Md. 396; Ernier v. Richards, 25 Ill., 289; Wright v. Leclair, 3 Iowa, 241; Whittaker v. Conly, 12 Iowa, 595; Maddox v. Graham, 2 Met. (Ky.) 56; Clark v. Sammons 12 Iowa, 368; Young v. Black, 7 Cranch, 567; Chapman v. Smith, 16 How. 114; Reay v. Dunkin, 20 Ark. 85.

If strangers who have no interest in that subject-matter are to be in like matter concluded, because their controversies are supposed to involve the same question of law, we shall not only be forced into series of endless inquiries, often resulting in little satisfaction, in order to ascertain whether the question is the same, but we shall also be met by the query, whether we are not concluding parties by decisions which others have obtained in fictitious controversies and by collusion, or suffered to pass without sufficient consideration and discussion, and which might have been given otherwise had these parties an opportunity of being heard.¹

SEC. 32. All judgments are supposed to apply the existing law to the facts of the case ; and the reasons which are sufficient to influence the court to a particular conclusion in one case ought to be sufficient to bring it or any other court to the same conclusion in all other similar cases where there has been no change in the law since the decision. There will thus be uniform rules for the administration of justice, and the same measure that is meted out to one would be received by all others. And even if the same or any other court, in a subsequent case, should be in doubt concerning the correctness of the decision which has been made, there are consequences of a very grave character to be contemplated and weighed before the experiment of disregarding it should be ventured upon. That state of things, when judicial decisions conflict, so that a citizen is always at a loss in regard to his rights and his duties, is a very serious evil ; and the alternative of accepting adjudged cases as precedents in future controversies resting upon analagous facts, and brought within the same reasons, is obviously preferable. Precedents, therefore, become important, and counsel are allowed and expected to call the attention of the court to them, not as concluding controversies, but as guides to the judicial mind.

SEC. 33. Kent says : "A solemn decision upon a point of law arising in any given case becomes an authority in a like case, because it is the highest evidence which we can

¹ Cooley on Const.

have of the law applicable to the subject, and the judges are bound to follow that decision so long as it stands unreversed, unless it can be shown that the law was misunderstood or misapplied in that particular case. If a decision has been made upon solemn argument and mature deliberation, the presumption is in favor of its correctness, and the community have a right to regard it as a just declaration or exposition of the law, and to regulate their actions and contracts by it. It would, therefore, be extremely inconvenient to the public if precedents were not duly regarded and implicitly followed. It is by the notoriety and stability of such rules that professional men can give safe advice to those who consult them, and people in general can venture to buy and trust, and to deal with each other. If judicial decisions were to be lightly disregarded, we should disturb and unsettle the great landmarks of property. When a rule has once been deliberately adopted and declared, it ought not to be disturbed, unless by a court of appeal or review, and never by the same court, except for very urgent reasons, and upon a clear manifestation of error; and if the practice were otherwise, it would be leaving us in a perplexing uncertainty as to the law."¹

SEC. 34. After a recovery by process of law, there must be an end to litigation; if it were otherwise, there would be no security for any person, and great oppression might be done under color and pretence of law.² To fathom the grounds and motives which may have led to the determination of a question once settled by the jurisdiction to which the law has referred it, would be extremely dangerous; and it is better for the general administration of justice that one individual should be inconvenienced, than that the whole system of jurisprudence be overturned, and endless uncer-

¹ King v. Younger, 5 T. R. 450; Boone v. Banners, 20 Miss. 216; Palmer v. Laurence, 5 N. Y. 389; Kneeland v. Milwaukee, 15 Wis. 458; Rex v. Cox, 2 Burr. 787; 1 Kent, 475; Selby v. Banleus, 3 B. & Ad. 17; Fletcher v. Somers, Cro. Jac. 527; Brooms Max. 109; Hammond v. Anderson, 4 B. & P. 69; Anderson v. Jackson, 16 Johns. 402; 3 Bing. 588; Goodtitle v. Otway, 7 T. R. 416; Goodell v. Jackson, 20 Johns. 722; Bates v. Relyea, 23 Wend. 340; Emerson v. Atwater, 7 Mich. 12; Nelson v. Allen, 1 Yerg. 376.

² 7 T. R. 269.

tainty be introduced.¹ And we ought also to see that the first litigation was conducted in entire good faith, and all the facts were presented to the court which could properly have weight in the construction and application of the law. These things being manifestly impossible, the law therefore wisely excludes judgments from being used to the prejudice of strangers to the controversy, and restricts their conclusiveness to parties thereto, and their privies.² Even parties and privies are bound only so far as regards the subject-matter then involved, and are at liberty to raise the same questions in another distinct controversy affecting a distinct cause of action.³

SEC. 35. And if there be any one principle of law well settled, beyond all question, it is this: that whensoever a cause of action, in the language of the law, *transit in rem judicatum*, and the judgment thereon remains in full force and unreversed, the original cause of action is merged, and gone forever. A case illustrative of this principle is that of *Marriot v. Hampton*, 7 Term. Reports, 269. Where A. sued B. for the price of goods sold, for which B. had paid and obtained a receipt before the suit was commenced, not being able to find his receipt, and having no other proof of payment, A. recovered judgment against B. for the price of the goods sold; B. was obliged to submit to the payment of the money again, but afterwards found the missing receipt, and brought an action against A. for money had and received, to recover back the amount of the sum of payment thus wrongfully enforced; but he was estopped on the ground

¹ 1 Q. B. 631; Vin. Abr. (Judgment, *m, a*); *Schumann v. Weatherhead*, 1 East, 541.

² *Burrill v. West*, 2 N. H. 190; *Davis v. Wood*, 1 Wheat. 6; *Jackson v. Vedder*, 3 Johns. 8; *Van Bookklein v. Ingersoll*, 5 Wend. 315; *Case v. Reve*, 14 Johns. 79; *Smith v. Balantyne*, 10 Paige, 101; *Alexander v. Taylor*, 4 Denio, 302; *Orphan House v. Laurence*, 11 Paige, 80; *Wood v. Stephen*, 1 S & R. 175; *Thomas v. Hubbell*, 13 N. Y. 405; *Peterson v. Lothrop*, 34 Penn. St. 233; *Twombly v. Henry*, 4 Mass. 448; *Estey v. Strong*, 2 Ohio, 401; *Cowles v. Hartz*, 3 Conn. 516; *Floyd v. Mizizer*, 5 Rich. 361; *Riggin's ex'rs v. Brown*, 12 Georgia, 271; *Person v. Jones*, 12 Georgia, 671.

³ *Vanalstyne v. R. R. Co.* 34 Barb. 28; *Cook v. Viemont*, 6 B. Mon. 284; *Taylor v. McCracken*, 2 Blackf. 260.

that the former suit was conclusive, and that money paid under legal process could not be recovered back again, and the same evidence used in the second suit would have been a good defense in the first ; B. was bound to either produce the evidence or submit to the judgment of the court, and that when once *res judicata*, it was conclusive in any subsequent action arising from the same transaction.

SEC. 36. Every judgment is *prima facie* a substantial and final determination of the matter in controversy, and this presumption cannot be overcome by extrinsic evidence, unless there is something on the face of it to justify its admission. Individual good and public policy both require that there should be some fixed and certain end to litigation, and that suitors that have been once discharged from attendance in court, shall not be again brought before it without sufficient reason ; and as this rule must be inflexible to effect its object, it will not yield to the clearest proof that a defense or cause of action was overruled which ought to have been sustained, or sustained when it ought to have been excluded, and that injustice will result unless the mistake is overruled. The conclusive effect of a judgment is the same, whether it was rendered upon the evidence or a technical rule of law ; and a plea of a prior recovery, for the same cause of action, cannot be answered by a replication that the decision was not on the merits, without showing that the proceeding was such that they could not have been decided. Suitors are bound to prepare and present their cases in a proper manner, and cannot allege their own carelessness or ignorance as a cause for being relieved from its consequences. A defendant cannot escape from the consequences of an adverse judgment on the ground that he had a good defense in fact, and relied inconsiderately on an untenable point of law ; and a plaintiff is precluded from regaining his mistakes or omissions by recourse to another action, unless under rare and peculiar circumstances.

SEC. 37. Matters which have been once settled by judicial authority cannot be again drawn into controversy, as between parties and privies to their decision. As the

nature of the judgment does not affect the operation of this principle, a decree with regard to the personal *status* of an individual will be equally conclusive with a decision upon a right of property. The appointment or removal of a guardian or administrator, or the adjudication of a question of descent or pedigree is conclusive, not only in the proceeding in which they may take place, but in every other in which the same matter is agitated. The manner in which the question is actually brought before the court is immaterial, as long as it is actually decided; whether the action of the court is formal or summary on motion, makes no difference in the conclusiveness of the judgment, if as it is presumed, until it is otherwise proven, that there was an opportunity to appear and contest the case on its merits; and hence, an adjudication under a rule to show cause will preclude a renewal of the controversy at law, or even an application for relief in equity.

SEC. 38. Burgundus, divides judgments, (*Sententia*) into three classes: 1. *In rem*; 2. *In personam*; 3. Mixed *in rem et in personam* "*Omniū condemnationen summa divisio, pariter intra genera deducitur aut eīnīm in rem, aut in personam, aut in utramque concipiuntur. In rem quoties alicuius res. asseritur, hoc est ejus esse dicitur vel jure creditoris, aut alio modo possidentur datur. In personam, si condemnitur ad aliquid dandum aut non faciendum, vel si personae statuī, official. In utramque, si et res, et personae simul in condemnationem veniant.*" The first respects things either the proprietary right or ownership, or the right of possession of a creditor or some other right or title. The second respects the quality, state or condition of persons and pronounce against them judgments purely personal *ad dandum, aut faciendum, aut non faciendum*. The last respects both persons and things, either in adjudging the property to one, or pronouncing against him a personal judgment for the benefit of the other and adjudging the other to make restitution of the profits to him, so that it is the title of the action which characterizes it.¹

¹ Boullenois Obs. 25 P. 601, 602.

In regard to their conclusiveness they may be divided into two classes :

1. Judgments *in rem*.
2. Judgments *in personam* or *inter partes*.¹ ———

An adjudication upon the status of a particular person has as conclusive an effect as an estoppel as a judgment or decree *in rem*, which is an adjudication upon the status of a particular inanimate thing ; that renders the thing *ipso facto*, what it declares it to be.

In regard to both these classes of judgments, one important fact or principle must not be overlooked, and that is, that for the purpose of proving its own existence, the production of a record is conclusive upon the whole world ; the record of the judgment is generally produced in evidence, not for the purpose of proving the fact of its own existence, but for that of concluding some party upon the point adjudicated ; and here arises the distinction above adverted to, between judgments *in rem* and judgments *inter partes* ; the former having this conclusive effect, the effect of the latter being much more limited.

¹ Duchess of Kingston case, 20 Howell, St. T. 478 ; Earl of Bandon v. Beecher, 3 Cl. & F. 510 ; Smith Lead. Cases, 659.

CHAPTER III.

PERSONAL JUDGMENTS; OR, JUDGMENTS BETWEEN PARTIES.

SECTION 39. In a preceding chapter we have seen the distinction between judgments *in rem* and *in personam*, and as the latter class of judgments are by far the most extensive of the two, estoppel, in its application to personal judgments, or judgments between parties, will now be considered. The great distinction is in this fact, that while a judgment *in rem* (which will hereafter be fully treated) is conclusive upon the whole world, a judgment *in personam* or *inter partes* is conclusive only upon parties to the proceedings and their privies. The fundamental principle of law upon which this branch of the doctrine of estoppels is founded, and which in law governs it to a great extent, is *res inter alios acta alteri nocere non debet*, which, in effect, is to prevent a litigant party from being estopped, or even affected, by the evidence, acts, conduct, or declaration of strangers; and, as a general principle, it may be stated as one thoroughly well settled, that a transaction between two parties should not be binding upon third parties; for it would be inflicting great wrong and injustice to conclude and bind parties who could not be allowed to make a defense, or permitted to examine witnesses, adduce any testimony, or to appeal from a judgment that they might deem erroneous; and for this reason the depositions of witnesses in another action in proof of a fact, the verdict of a jury finding the fact, and the judgment of the court upon the facts found; while evidence of the most conclusive kind against the parties, and all claiming under and through them, can not, generally, be used to the prejudice of strangers.¹ The principle upon which judgments are held conclusive upon the parties, requires that the rule should apply only to that

¹ King v. Norman, 4 C. B. 897; Duchess of Kingston case, 20 How. St. T. 578.

which was directly in issue, and not to every thing which was incidentally brought into controversy during the trial. The evidence must correspond with the allegations, and be confined to the point in issue. It is only to the material allegations of one party that the other can be called to answer ; it is only upon such that an issue can properly be formed ; to such alone can testimony be regularly adduced ; and upon such an issue only is judgment to be rendered. A record, therefore, is not held conclusive as to the truth of any allegations which were not material nor traversable ; but as to things material and traversable, it is conclusive and final.

SEC. 40. The celebrated judgment of Chief Justice De Grey, expressing the unanimous opinion of the judges in the great English case of the Duchess of Kingston, is cited as the leading authority in every case where this branch of estoppel is applicable, and it so clearly and comprehensively defines the principles applicable to the subject under consideration, that as a leading example of the foundation of the doctrine, it may be well to quote a greater portion of it. The Chief Justice said : " What has been said at the bar is certainly true, as a general principle, that a transaction between two parties, in judicial proceedings, ought not to be binding upon a third. From the variety of cases relative to judgments being given in evidence in civil suits, these two deductions seem to follow as generally true. First, that a judgment of a court of concurrent jurisdiction, directly upon the point, is AS A PLEA, A BAR, AS EVIDENCE, CONCLUSIVE, between the same parties, upon the same matter directly in question in another court. Secondly, that the judgment of a court of exclusive jurisdiction, directly upon the point, is, in like manner, conclusive upon the same matter, between the same parties, coming incidentally in question in another court, for a different purpose. But neither the judgment of a concurrent or exclusive jurisdiction is evidence of any matter which came collaterally in question, though within their jurisdiction, nor of any matter incidentally cognizable, nor of any matter to be inferred by argument from the judgment."

SEC. 41. A much more conclusive effect is given to judgments of courts of *exclusive* jurisdiction than to the judgments of courts which have only *concurrent* jurisdiction. With regard to *the parties*, between whom they are to be used, and the *matter* to which they relate, these two classes of judgments are put upon the same footing, and subject to the same limitation and restriction; the *subject-matter* must be identical; and the *parties* also the same. There is a vast difference in the two classes of judgments in reference to the *occasion* and *manner* in which it is proposed to use them. It is only upon a matter *directly in question* that a judgment of a court of *concurrent* jurisdiction is conclusive—while the judgment of a court of *exclusive* jurisdiction is conclusive, not only when the matter comes directly in question, but also when it comes *incidentally* in question. This difference with regard to the effect of the conclusiveness of judgments, results from the difference in the constitution of the tribunals which pronounce them. When a matter, over which some other tribunal is permitted to have exclusive jurisdiction, comes directly or incidentally in question, and the judgment of that court is offered in evidence as proof of the matter, it must necessarily be *conclusive*; implicit credit must be given to a court so constituted, while its judgment is in full force and unreversed; for the court in which the particular matter is to be proved, has no authority to examine into the merits of the judgment, but must take the matter as judicially and conclusively decided.¹

SEC. 42. The judgment or decree of a court of *dernier* resort in a particular case is final and conclusive upon all other courts, not only as to the merits of the cause, but the jurisdiction of the court, and is conclusive whenever the same matter is again drawn into controversy. But the exception to this rule of conclusiveness is, that it does not apply to points not under consideration, or incidentally considered, or which can only be argumentatively inferred from the judgment. The United States courts are courts of limited jurisdiction; yet they are not inferior courts, and their judgments and decrees have the same conclusive effect as all

¹ Phil. Ev.

other judgments until reversed or annulled; and so conclusive is the effect of their judgments, that after the term of court at which they were rendered they cannot be set aside or revoked. Their power over the subject-matter has gone, and the only remedy is that of appeal; and they are of such a binding effect that although the record does not show any jurisdiction¹, the rights of third parties dependent upon it cannot be in any way impaired in any collateral proceedings as long as the judgment is unreversed or unannulled. Chief justice DE GREY, in the case of the Duchess of Kingston, in stating the rule of law in regard to the effect of a judgment, distinctly says that where the parties are the same in the subsequent as in the first suit, the judgment is conclusive between the same parties and all those claiming under and through them.

SEC. 43. In regard to the term parties, as used in connection with the doctrine of estoppel, the law includes all who are distinctly interested in the subject-matter of the suit and had a right to make defense or to control the proceedings, and to appeal from the judgment, the right to adduce testimony and to cross examine the witnesses adduced on the other side. Persons not having these rights are regarded as strangers to the record.² If parties to a suit are bound, natural justice requires that all persons claiming under or through them should also be concluded, for there is a mutuality of interest between parties and their privies; one of the general rules is, that estoppels ought to be reciprocal or mutual, it is therefore well settled that no record of a conviction or verdict can be used as an estoppel unless in cases where the benefit is mutual, that is, such as might have been given in evidence by either of the parties to the action; and in Gilbert on evidence it is laid down that nobody can take benefit by a verdict who had not been prejudiced by it, had it gone contrary, and this seems to be settled the rule.

SEC. 44. Estoppels, like all other branches of law, are founded upon certain fundamental principles or rules. In

¹McCormick v. Sullivan, 10 Wheaton 192; *ex parte* Watkins, 3 Pet. 193; Kennedy v. Georgia Bank, 8 Howard, 556; Huff v. Hutchinson, 11 How. 386.

²Greenleaf Ev.

their application to parties, privies and strangers as regards their conclusive effect, the maxim of *res inter alios acta* is one of the fundamentals applicable in regard to strangers. The judgment in the case of the Duchess of Kingston declared that a record was conclusive between the same parties ; and in Buller's *Nisi Prius*, the reason for the rule of conclusiveness between parties and those claiming under and through them, and that parties not so connected with the subject-matter of the controversy were not so bound, is thus stated : The verdict ought to be between the parties, otherwise a man might be bound by a decision, who had not the liberty to cross-examine ; and nothing can be more contrary to natural justice than that a man should be injured by a determination that he, or those under whom he claims, was not at liberty to controvert. It would be unjust that such proceedings should be evidence against strangers. Numerous reasons might be given for this rule, one of which might be, that if the stranger had been a party to the action, in place of the party who recovered judgment, the result might have been different ; as the parties were different, there is every reason to believe that the evidence would have been, part of which may have been inadmissible and part uncertain, or evidence of a totally different character might have been introduced by the unsuccessful party, which would have changed the result. To give such a judgment the effect of an estoppel, would be giving a party the benefit of testimony which he might be allowed to introduce in an action, in which he was a party or directly interested. The principal reason other than those given is, that all estoppels must be mutual, and this is the reason that regularly a stranger shall neither be bound by, nor take an advantage of an estoppel, and it must be conceded that it would be a hardship were it otherwise ; but the converse of this rule is equally true, that by proceedings to which he was not a stranger he may well be bound, for there would be no injustice in such a case.

SEC. 45. The maxim "*qui sentit commodum sentire debet et onus*," is applicable in support and as particularly explanatory of this branch of the law of estoppel, in accordance

with which the record of a verdict followed by a judgment *inter partes* will estop not only the original parties, but those also who claim under them. A man will be bound by that which bound those under whom he claims *quoad* the subject-matter of the claim, for he who derives the benefit from a thing ought to sustain the burden, or feel the disadvantages attending it. And no man, except in certain cases, which are regulated by the statute law and law merchant, can transfer to another, a better right than he himself possesses. The grantee shall not be in a better condition than he who made the grant, and, therefore privies in blood, law and estate shall be bound by and take advantage of estoppels.¹ In order to give full effect to the rule by which parties are held estopped by a judgment; all persons who are represented by the parties or claim under them or in privity with them are as equally and as effectually estopped by the same proceedings.

SEC. 46. A personal judgment or a judgment between parties not only binds the parties but those claiming under or through the parties. Therefore such judgments conclude, viz :

1st. PARTIES and

2d. PRIVIES thereto.

The term privity used in this connection denotes mutual succession or relationship to the same rights of property.² Persons standing in this relation to the litigating party, are bound by the proceedings to which he was a party, and the reason for this rule is, that they are identified with him in interest, and whenever this sameness is found to exist, all are alike estopped. Hence all privies, whether in estate in blood, or in law, are estopped from litigating that which is conclusive upon him with whom they are in privity.³ Lord Coke divides privies into three classes :

1. Privies in blood.

2. Privies in law.

3. Privies by estate.

¹ Poth Oblig. 263; B. L. M. 634; 2 Coke Litt. 352; Outram v. Morewood, 3 East 346.

² 1 Greenleaf Ev.

³ Carver v. Jackson, 4 Peters, 85; Chapin v. Curtis, 23 Conn. 388; Emery v. Fowler, 39 Maine, 326; Key v. Dent, 14 Md. 86.

A privy in blood, as for example an heir, would be estopped by a verdict against his ancestor through whom he claims, and may take advantage of judgment in favor of an ancestor. Coke gives as instances of privy in law, lord by escheat, tenant by curtesy, tenant in dower, the incumbent of a benefice, and others that come in by act of law or in the *post*.¹ An executor or administrator, suing as such, will be bound by a verdict against his testator or intestate to whom he is privy in law. One of the leading cases in which the doctrine of estoppel by a judgment *inter partes* in regard to privies is laid down, is the celebrated English case of *Outram v. Morewood*, reported in 3d East, page 125, and was decided by Lord Ellenborough, Chief Justice: The question in that case, said the learned judge, “*is whether the defendants, the husband and wife, are estopped by this verdict and judgment from averring, contrary to the title there found against the wife.*” The operation and effect of this finding, if it operates at all as a conclusive bar, must be by way of an *estoppel*. If the wife were bound by this finding, as an estoppel, and precluded from averring the contrary of what was then so found; the husband, in respect to his privy, either in estate or in law, would be equally bound, according to what is said in Co. Litt. 352. “Privies in estate, as the feoffee, lessee, etc.; privies in law, as the lord by escheat, tenant by the curtesy, tenant in dower, the incumbent of a benefice, and others that come in by act of law in the *post*, shall be bound by and take advantage of estoppels. The question then is: Is the wife herself estopped, by this former finding, to aver the contrary? In *Brooke*, tit. Estoppels, pl. 15, it is said to be agreed that all the records in which the freehold comes in debate shall be estopped with the land and run with the land, so that a man may plead this as a party, or as heir, as privy, or by *que estate*. But if it be said that by the freehold coming in debate must be meant a question respecting the same, in a suit in which the freehold is immediately recoverable, as in assize or in writ of entry, I answer, that a recovery upon any one suit in issue, joined on matter of

¹ 2 Coke Litt. 352, b.

title, is equally conclusive upon the subject-matter of such title, and that a finding upon title in trespass not only operates as a bar to the future recovery, by way of damages for a trespass founded upon the same injury, but also operates by way of an estoppel to any action for an injury to the same supposed right of possession." And in accordance with the well settled doctrine of estoppel, and "the reason and convenience of the thing, and the analogy to the rules of law in other cases, decided, *that the husband and wife, the defendants in this case, are estopped by the former verdict and judgment on the same point in the action of trespass, to which the wife was a party.*" This case is an example of the well-settled principle, that a verdict negating the right of a defendant stated in his plea, estops¹ him in a subsequent action from asserting that right as plaintiff against the same party. And in another English case it was decided that a judgment against a schoolmaster, concerning the rights of office, is evidence against his successor.² So, a judgment of *ouster* is conclusive in a *quo warranto* against a person claiming to have been admitted to a corporate office, by or through a party against whom the judgment was obtained.³ But there is no privity between an executor or administrator and the heir or devisee of all the land, and a judgment against the administrator or executor will not have that conclusive effect to charge the real estate of the heir or devisee.⁴ In the case of *Combs v. Turlton's adm'rs*,⁵ it was held that a decree for the specific execution for a covenant in a suit commenced by the covenantee, and afterwards revived in favor of his heirs, was no bar to an action brought by his administrator to recover damages for breach of the covenant, if the administrator was not made a party to the action of revivor; and the only relief the covenantor had from the double burden of executing the covenant and paying damages for the breach, was in resorting to a court of equity. But, under the laws of New York, a judgment against an

¹ *Ontram v. Morewood*, 3 East, 346.

⁴ *Deneale v. Stump's ex'rs*, 8 Peters,

² *Brounker v. Atkins*, Skinn. 15; 528.

Berry v. Barnes, Peake, 156.

⁵ 5 Dana Rep. 574.

³ *Bullers N. P.* 231; *King v. Grimes*.

heir or devisee is an estoppel to a subsequent suit against an executor or administrator of the ancestor or devisee for the same debt or damage, unless it can be shown that the judgment against the heir and devisee is unsatisfied or that sufficient property has not descended, or been devised, to the heir or devisee. A judgment against an heir or devisee for a debt or legacy expressly charged on the estate devised or descended, is an estoppel to any subsequent action against the executor or administrator for the same debt or legacy.¹ At common law there is no privity between an executor and administrator *de bonis non cum testamento annexo*, and a judgment recovered by the former will not bar a suit brought by the latter; and the rule is the same where an administrator recovers judgment and dies; this does not estop the succeeding administrator from bringing a new action.²

SEC. 48. Privies in estate are where there is a mutual or successive relationship as to rights, as in the case of lessor and lessee, donor and donee, joint tenants, persons who have an interest in an estate created by another; a person may be a privy in estate and contract, as a lessee who from the nature of the covenant entered into by him, while an assignment destroys the privity of estate the privity of contract remains, and he may be liable on his contract.

SEC. 49. If a party after a judgment against him assign his interest, his assignee will be bound; as it is conclusive against the assignor it must be against the assignee, for the substitute can be in no better position than the principal,³ as for example where a mortgagor, when sued for possession, pleaded usury as a defense and failed in establishing it, he afterward assigned his rights to a third party, who brought a writ of entry against the mortgagee, and in support of his action plead usury. The former judgment between the mortgagor and mortgagee was held conclusive against him.

¹ 2 N. Y. R. S. 114. §§ 8 and 10.

² Grant v. Chamberlain, 4 Mass. 611; Allen v. Irwin, 1 S. & R. 549; Barnhurst v. Yelverton, Yelv. Rep. 83.

³ Bac. Abr. 617; 2 Starkie Ev. 194; Adams v. Barnes, 17 Mass. 365; Greenliff Ev.

All privies, whether in estate, in blood or in law, are estopped from litigating that which is conclusive upon him with whom they are in privity. And if one covenants for the result or consequences of a suit between others, as if he covenants that a certain mortgage, assigned by him, shall produce a specified sum, he thereby connects himself in privity with the proceedings, and the record of the judgment in that suit will be conclusive evidence against him. But to prevent this rule from working injustice it is essential that its operation be mutual. Both the litigants must be alike concluded, or the proceedings cannot be set up as an estoppel upon either. For if the adverse party was not also a party to the judgment offered in evidence, it may have been obtained upon the party's own testimony; in which case, to allow him to derive a benefit from it would be unjust.

SEC. 49. It is scarcely necessary to observe that the conclusive effect of judgments *in personam* depends upon the fact of whether the same point was in issue in the former action. The rule as laid down in the Duchess of Kingston's case is the well settled rule of all countries, that judgments of courts of concurrent jurisdiction are not admissible in a subsequent suit, unless they are not only between the same parties, but also upon the same matters coming in question, and directly upon the point.¹ "A judgment estops the parties only as to the grounds covered by it and the facts necessary to uphold it. Parties are not allowed to prove what is inconsistent with its rectitude and justice, for while it stands unreversed it is final as to the points decided, but not in respect to matters which the record itself shows were not in question, and therefore when a cause has gone off for some defect, which precluded an inquiry into its merits, the judgment is usually no bar to a second action. So a reversal of a judgment proves nothing but its own correctness, and it only nullifies what has been done, and leaves the parties in the same situation as to their rights and remedies, in regard to the subject-matter in litigation, as if no judgment had been rendered.

¹Hopkins v. Lee, 6 Wheaton, 109; Haney v. Richards, 2 Gall. 216; Minor v. Walter, 17 Mass., 237.

SEC. 50. The dismissal of a bill in chancery is not always conclusive of the complainant's right in a court of law, although the bill may have been filed for the same matter,¹ for if a complainant endeavors in a court of equity to enforce a strictly legal title, when his remedy is at law, the dismissal amounts to a declaration that he has no equity, and does not reflect upon his legal title—for as it concludes nothing, it can prove nothing; and if a decree in express terms professes to affirm a particular fact, if that fact is immaterial in the case, it will not estop the parties in relation to that fact.² Where a cause of action is the same in two suits, a prior judgment in one will be a bar to the other. But where they are different, though the point in controversy is the same, the prior judgment is no bar to the subsequent action,³ but the judgment is evidence to prove such point, while a prior judgment may be no bar, strictly and technically speaking, where the cause of both objects are not identical, it does not follow that either party in the subsequent action can be allowed to contradict what was expressly adjudicated in the first, and in this country the principle is well settled that the judgment of a court of competent jurisdiction, directly upon a particular point, is as between the parties conclusive in relation to such point, though the subject-matter and object of the two suits may be different, and yet a judgment may not only be *evidence* but *conclusive evidence*, and still no bar to a second action.⁴

SEC. 51. But when the same matter is directly in question in another suit, and the judgment of the former suit is directly in point, *it will be as a plea, a bar, as evidence*, conclusive. This is the rule of every system of jurisprudence, not only from its obvious fitness and justness, but if it were otherwise, there never could be an end to litigation; and it is not only applicable to courts of concurrent

¹ Wright v. Deklyne, 1 Pet. C. C. R. 198.

² Hotchkiss v. Nichols, 3 Day, 138; Coit. v. Tracy, 8 Conn. 268.

³ Swift Evidence, p. 17.

⁴ Betts v. Starr, 5 Conn. 559; Wright v. De Kline, 1 Peters C. C. 198; Star-
kie v. Woodward, 1 Nott & McCord, 329; Canan v. G. Turnpike Co., 1 Conn.
1; Cist v. Ziegler, 16 S. & R. 282; Gardner v. Buckbee, 3 Cow. 120; Wright
v. Butler, 4 Wend. 284.

jurisdiction in England and America, but is applicable to orphans' courts in Pennsylvania; to a discharge under the insolvent laws; to a decision of a court of probate, though admitted to be erroneous; to a decree of the county court pursuant to the statute; to a decision of a court of common pleas upon a complaint made pursuant to statute for overflowing lands; to a decree of a county court awarding money to claimants from the sale of lands by the sheriff, though the decree was made upon a mistaken notion of law, and there was no remedy by writ of error; ¹ to a record of the forfeiture of a recognizance, where debt was brought upon such recognizance; to decrees of court of equity; to sentences of courts of admiralty and of ecclesiastical tribunals, and in fact to every court which has proper cognizance of the subject-matter so far as they profess to decide the subject-matter in dispute.

SEC. 52. The solemn decisions or judgments of tribunals of justice made in the exercise of their rightful jurisdiction, where the parties have had an opportunity of being heard or making a defense, and upon due deliberation, are in the law conclusive upon all points, directly involved. The fundamental principle, *interest reipublicæ ut sit finis litium*, being regarded as governing this branch of the law; and it makes no difference whether the courts rendering the judgments be of limited or general jurisdiction, whether they are courts of record or not, as long as they act within their jurisdiction or sphere assigned to them, their adjudications are conclusive between the same parties and their privies upon the same subject matter; ² and in conclusion it must be remembered that this conclusive effect is only applicable where the tribunal rendering the judgment had jurisdiction over the parties or subject-matter in controversy. When a court transcends the limits prescribed for it by the law, and assumes to act where it has no jurisdiction, its adjudications will be utterly void and of no effect either as an estoppel or otherwise.

¹ Gratz v. Lancaster Bank, 17 S. & R. 278. ² Starkie Ev.; 2 Greenlf. Ev.; 2 Phil. Ev.

² Kilheffer v. Herr, 17 S. & R. 319;

SEC. 53. In order (generally) to make a person a party to a judicial proceeding, it is necessary to make a formal and legal service of summons upon him to appear, or by voluntary appearance of the party without service.¹ But there is an exception to this, as there is generally to all rules of law, and the exception is that by the intervention of a party in the prosecution or defense of an action in which he is interested, he is held to be concluded by the result,² nor can the rights of such third persons be impaired by any collateral proceedings. In other cases where parties were allowed to notify third persons to come in and take defense, and where such notice did not emanate from the court.³

In matters of private right, a judgment is evidence only against parties and privies. A court will look beyond the record, and treat as parties, all who are found to have in fact acted a part, and this, whether their interference was irregular or not. Yet, except in particular cases, no one will be forced to become a party, indirectly, who could not be brought in directly; and even in the excepted cases, he must have had notice to defend. The notice to defend is derived by analogy from the voucher to warranty, and came into use with the personal action of covenant, when it superseded both the voucher and the ancient *warrantia chartæ*; and like the voucher, its object is a recovery over against the warrantor, with whom none but the party against whom the recovery has been had, has to do.

The purpose of giving notice, is not in order to give a ground of action; but if a demand be made which the party indemnifying is bound to pay, and notice be given to him, and he refuses to defend the action, in consequence of which the person indemnified is obliged to pay the demand, that is equivalent to a judgment, and estops the other party from saying that the defendant in the first action was not bound to pay the money.⁴

¹ Martin v. Germandt, 19 Penn. 124.

² Jones v. Heller, 4 Binney. 161;

³ Adams v. Preston, 22 Howard, 473; Peterson v. Lathrop, 10 Casey, 223; Carpenter v. Pier, 1 Shaw, 81.

Chirac v. Reicheker, 2 Peters. 617.
⁴ Duffield v. Scott, 3 T. R. 347; Jones v. Williams, 7 M. & W. 493.

SEC. 54. A defendant may call upon any one whose liability for the cause of action is primary as compared with his own, to assume the burden of the defense in the action; the notice given by the defendant will be as effectual in binding such party by the judgment rendered in such action as though the notice emanated from the court;¹ and, while as a general rule, a principal is not bound as privy by a judgment on an action of debt against the guarantor or surety,² to which he is not made a party and may contest the validity of the judgment;³ he is brought within the reach of the estoppel when notified by the defendant to come in and take part in the defense.⁴ Covenants to indemnify against the consequences of a suit are of two classes: First, where the covenantor expressly makes his liability depend upon the event of a litigation to which he is not a party, and stipulates to abide the result; in this class the judgment is conclusive evidence against the indemnitor, though he was neither a party or had notice; for its recovery is the event against which he covenanted. Second, where the covenant is one of general indemnity, against claims or suits, the want of notice does not go to the cause of action, and the judgment is only *prima facie* evidence against the indemnitor, and he may be let in to show that the principal had a good defense to the claim which he neglected to make, to defeat the judgment, or that it was obtained by fraud or collusion, etc., but if notice is given they are concluded.⁵ This rule applies in like manner between grantor and vendor, and the grantee and vendee of real and personal property in an action against the vendee or grantee by third parties, the grantor or vendee as the case

¹ Littleton v. Richardson, 34 N. H. 179; Thrasher v. Harris, 2 N. H. 443; Jackson v. Marsh, 5 Wend.; Beers v. Pinney, 12 id. 309.

² Brown v. Chancey, 1 Kelly, 410; Douglas v. Howland, 24 Wend. 35; Jackson v. Griswold, 4 Hill, 522; Moore v. Lucas, 8 Blackfd. 9.

³ French v. Parrish, 14 N. H. 496.

⁴ Duffield v. Scott, 3 T. R. 374; Jones v. Williams, 7 M. & W. 492; Thomas v. Hubbell, 18 Barb. 9.

⁵ Duffield v. Scott, 3 T. R. 374; Smith v. Compton, 3 B. & E. 407; Lee v. Clark, 1 Hill, 56; Rapelye v. Prince, 4 Hill, 119; Patton v. Caldwell, 1 Dallas, 419; Ins. Co. v. Wilson, 34 N. Y., 180; Brown v. Chancey, 1 Kelly, 410; Moore v. Lucas, 8 Blfd. 9; French v. Parrish, 14 N. H. 496; Jones v. Williams, 7 M. & W. 492; Thomas v. Hubbell, 18 Barb. 9.

may be, when notified or called upon to assume the burden of a suit in ejectment or trover, else be concluded and bound by the judgment and estopped from disputing the title on which the action is brought in a subsequent suit against himself, in an action founded upon an express or implied warranty or covenant in the sale or grant.¹ The notice, however, to have this conclusive effect, must clearly and explicitly convey the precise information and notify the party to whom it is written or sent ; that unless he takes the necessary steps to defend the suit and prove the validity of his title in the first suit, he will be estopped from doing so in the subsequent action.² The principle, *interest reipublicæ ut sit finis litium*, will thus be seen to pervade the entire branch of this doctrine of the law, and all instances and cases cited, all decisions made, have their foundation in this fundamental maxim.

SEC. 55. All heirs are privies when they claim or derive title through and from the ancestor; as an example, a case may be cited;³ in an adjudication a mother was declared a slave, the judgment was held conclusive evidence that all the children born prior to the judgment were also slaves ; this was on the fact that it operated as a judgment *in rem*, and *ipso facto* rendered her such as the judgment declared her to be. A husband may be bound by a judgment against a woman while a *feme sole*, as representing the person and succeeding to the estate of his wife.⁴ Every one who claims or justifies under a conveyance made or command given by another, is in privity with him who made the conveyance or issued the mandate, and is bound by an estoppel relating directly to the interest conveyed or right on which the mandate is founded.⁵ A master or principal is in privity with his servant or agent when the latter defends an action in the right of the former, and a judgment is an estoppel to a renewal of the

¹ Blasdale v. Babcock, 1 John. 518 ; Collingwood v. Irwin, 3 Watts ; Kelly v. The Church, 2 Hill, 115 ; Hamilton v. Cutts, 4 Mass. 348 ; Carpenter v. Pier, 1 Shaw, 81 ; Fisk v. Woodruff, 15 Ill. 15 ; Rawle on Cov. 226.

² Paul v. Witman, 3 W. & S. 410 ; Morrison v. Mullen, 34 Penn. 12.

³ Shelton v. Barber, 2 W. C. C. R. 82.

⁴ Outram v. Morewood, 3 East, 125 ; Hawkins v. Lambert, 18 B. Mon. 99.

⁵ Beebee v. Elliott, 4 Barb. 457 ; Calkins v. Allaton, 3 Barb. 171.

controversy by the principal or master¹ in the suit, on the ground that he is considered the real party, and specially when the principal expressly or impliedly authorized or ratified the acts of the agent, virtually rendering him a party to the proceedings instituted by or against the other.² We have already stated that no one can take advantage of a verdict, if they would not have been prejudiced by it, had it been contrary, as estoppels are mutual. So where an ejectment suit was brought by the assignee of the lessor against the assignee of the lessee, for the non-payment of rent on lease, containing a covenant for re-entry, and a judgment was rendered therein in favor of the plaintiff for recovery of possession of the premises. In a subsequent action, brought by a party claiming through a purchaser of the land at a foreclosure sale under a mortgage executed by the assignee of the lessee, subsequent to the date of the lease, but prior to the commencement of the ejectment suit, it was held that the judgment in the first mentioned ejectment suit was a bar to any recovery in the subsequent suit. The lessee was privy to the lessor and the defendant in the ejectment suit (the assignee of the lessee) was also privy. The grantee in the mortgage executed by such defendant, took subject to the rights of the lessor, and the sale of the premises under the foreclosure proceedings did not in any way affect or impair those rights, or give the plaintiff any title as against the defendant; and the title which the plaintiff claimed, through and under the defendant in the ejectment suit, having been perfected by the foreclosure proceedings after the ejectment suit was commenced, the judgment in the latter suit, in connection with the title which the evidence established under the lease, was conclusive against the plaintiff.³

SEC. 56. But in regard to the relation of principal and surety, or a principal and guarantor, the relation existing

¹ *Heller v. Jones*, 4 Bin. 11; *Castle v. Noyes*, 14 N. Y. 329; *Kent v. H. R. R.* 22 Barb. 278; *Peterson v. Lathrop*, 34 Penn. 223; *Baily v. Foster*, 9 Pick 139; *Case v. Reeves*, 11 John 572; *Farnsworth v. Arnold*, 3 Sneed. 252.

² *Kimbersly v. Orpe*, Doug. 517; *Alexander v. Taylor*, 4 Den. 302.

³ *Bennett v. Conchman*, 48 Barb. 73.

between them does not seem to render either of them privy to a suit against the other. The record of a judgment will be conclusive evidence of its own existence, but will not be conclusive or even *prima facie* evidence in a subsequent suit against the surety.¹ In regard to the relation of principal and guarantor, the authorities sustain the doctrine that where one man agrees to be responsible for another, this creates such privity between them, that a judgment rendered against the principal is *prima facie* evidence in an action brought on the guarantee;² and in Pennsylvania and Georgia the courts have even gone beyond this, and declared the judgment conclusive evidence. Judgments, in actions upon bonds or recognizances given for the faithful performance of the duties of sheriffs, constables, trustees, assignees, administrators and other parties filling offices of public or private trust, are held conclusive evidence, not because the sureties were privies, in point of law, to the action in which the judgment was rendered, but for the reason that, in point of fact, they had made themselves privies by stipulating and agreeing to be bound by its result;³ so, where a grantor by warranting title places himself in the position of guarantor, a judgment in ejectment against him will be *prima facie* evidence in an action of covenant against the grantor.⁴ A judgment against the principal is conclusive of the amount due, in an action on a bond of indemnity against the surety.⁵ A man becomes a privy whenever he agrees to be bound by

¹ Douglas v. Howland 24 Wend. 35; Morris v. Lucas, 8 Blackford, 9; King v. Norman, 4 C. B. 884; Tarleton v. Johnson, 25 Ala. 300; The Farmer v. McGraw, 31 Ala. 659.

² Drummond v. Prestman, 12 Wheat. 516; Berger v. Williams, 4 McLean, 577; McLaughlin v. Bank of Potomac, 7 How. 220; Bradwell v. Spencer, 16 Georgia; Jacobs v. Hall, 2 Leigh, 393; Bryant v. Pye, 1 Kelly, 395; Mason v. Strickland, 17 S. & R. 354; City of Lowell v. Parker, 10 Met. (Mass.) 314; Evans v. Commonwealth, 8 Watts, 398; Garver v. Commonwealth, 7 Penn. 265.

³ McCandless v. Horkle, 17 Ala. 459; Ralston v. Wood, 13 Ill. 151; Wiley v. Paulk, 6 Conn. 74; Heard v. Lodge, 20 Pick. 53; Heard v. Mitchell, 11 Gill. & S. 383.

⁴ Pitkins v. Leavitt, 13 Ohio; Paul v. Witman, 3 W. & S. 409.

⁵ Berger v. Williams, 4 McLean. 125; Livingston v. Hammer, 7 Bosw. 670.

the acts of a third person ; and where one agrees to be bound by the result of a judicial proceeding, as against a stranger or third person, under such circumstances that others have the right to insist on the fulfillment of his agreement, he will not be permitted to recede from his promise after the rendition of the judgment, to their injury.¹ A judgment against a defendant is conclusive on the bail ; he is estopped from averring that it was rendered for more than the amount due, because his principal suffered judgment to be taken by default, or through negligence ; but if he can show fraud or collusion between the parties to the action, he can go behind the judgment.² The same principle is applicable to sureties on an injunction bond, and in some States, on the ground of public policy, it includes the official bonds of administrators, constables, guardians, sheriffs, assignees and trustees.³ A judgment against an heir or devisee is a bar to a suit against an executor or administrator for the same demand. So, a judgment against the executor is not conclusive in a subsequent suit against the heir to render the lands of the testator liable to the debt.⁴ So, a decree for the distribution of a common fund among those interested, does not estop one who was not a party to the suit, and has been guilty of no laches. But it protects the assignee who makes the distribution under it pursuant to the decree ; but one who was not a party to the suit, and has not been negligent, may follow the fund and reclaim his proportion from the distributees.⁵

SEC. 57. A judgment against one of two joint makers of a promissory note is a bar to an action against both on the original joint promise,⁶ because the judgment extinguishes the note. So a judgment against one of two joint contractors is a bar to a subsequent action against both.⁷ But where a contract is joint and several ; a judgment against

¹ *The Church v. Barker*, 18 N. Y. 463 ; *Brown v. Sprague*, 5 Denio, 545.

² *Parkhurst v. Sumner*, 23 Vt. 538.

³ *Paul v. Witman*, 3 W. & S. 410 ; *Morrison v. Mullen*, 34 Penn. 12.

⁴ *Alston v. Mumford*, 1 Brock. 266.

⁵ *Goddring v. Oliver*, 17 How. 274 ; *Williams v. Gibb*, id. 239.

⁶ *Mason v. Eldred*, 6 Wallace, 231 ; *Sedan v. Williams*, 4 McL. 51.

⁷ *Trafton v. U. S.* 3 Story, 646.

one is no bar to a subsequent action, nor is the judgment against all, jointly, a bar to a subsequent action against one alone. For when a party enters into a joint and several obligation, he in effect agrees that he will be liable to a joint action and to a several action for the debt. The contract does not merely give the obligee an election of the one remedy or the other, but entitles him at once to both, though he can have but one satisfaction.¹ So a judgment against one joint trespasser, is no bar to an action against another for the same trespass.² A judgment against an administrator is conclusive as to personal estate, but *prima facie* as to real estate; the heirs and devisees may question any item included in the judgment against an administrator. Where any person, even an infant, does that which by law he is compelled to do, he is bound.³ Sureties are not estopped by a judgment against their principal in an action wherein they were not parties, and in an action against them they may allege fraud and collusion.⁴ Nor is a surety affected by the judgment if he is not a party to the action.⁵ A surety on a replevin bond is not estopped by recitals therein to show how much of the property mentioned in the writ was actually replevied when the officer's return is indefinite in this particular; nor is he estopped by the return of the officer unless it is definite, distinct and certain.⁶ A sheriff's return is of such authority that it cannot be contradicted;⁷ so a sheriff's recognizance is a record and cannot be impeached or contradicted by parol evidence other than that which is available against judgments and decrees of courts of record, such as false personation;⁸ but vagueness

¹ United States v. Cushman, 2 Sumner, 426.

² Lovejoy v. Murray, 3 Wall. 1; Matthews v. Menedges, 2 McL. 145, 26 L. R. 423.

³ Willard v. Willard, 56 Penn. 119.

⁴ Annett v. Terry, 35 N. Y. 256.

⁵ Clark v. Montgomery, 23 Barb. 464; Lee v. Clark, 1 Hill, 56.

⁶ Miller v. Moses, 56 Maine, 129.

⁷ Rice v. Groff, 58 Penn. 116; Tillman v. Davis, 28 Geo. 494; Smith v. Emerson, 43 Penn. 456.

⁸ Nucken v. Commonwealth, 58 id. 203; Newton v. State Bank, 14 Ark. 9; Bolles v. Bowen, 45 N. H. 124; McGough v. Wellington, 6 Allen, 505.

and want of precision furnish an exception to the rule.¹ An officer interested by law with the performance of a public duty, of which a record has been made, cannot impeach it.² Parol evidence is inadmissible to contradict an officer's return except in a suit against him for a false return ;³ and a defendant who is privy to a judgment, is equally bound ; principals and sureties are concluded by it, and a question that was involved and might have been decided in a suit, cannot be re-opened in an action against a defendant who was privy in law to the original judgment ; so if separate suits be brought for the same cause of action against co-obligors, where one is principal and the other is surety, and the principal is discharged on a trial of a plea to the merits, which would enure to both if sued jointly, such judgment is not an estoppel against the plaintiff, if pleaded by the surety in bar of the action against him, for the reason that strangers are not bound by an estoppel, nor can they take advantage of it.

When the contract into which the principal and surety have entered, is purely joint in its origin, or is rendered so by the form in which action has been brought upon it, a judgment for or against the former, will, of course, be a complete bar to any future proceedings against the latter, as a consequence of the general rule of law, and apart from the particular relations existing between them.⁴

SEC. 58. A judgment involving the title of the original vendor to a thing sold, is conclusive upon him, if the notice was given him of the pending of the action and its nature, and it makes no difference that the action is not against his vendee, but against a subsequent vendee, who in turn has sold the property.⁵ So subsequent attaching creditors and the assignee of the defendant upon the record having been admitted to defend in his name, may plead a former

¹ *L. Boom Co. v. Finney*, 58 id. 200.

² *Nucken v. Commonwealth*, 58 id. 203.

³ *L. B. Co. v. Finney*, 58 id. 200 ; *Miller v. Moses*, 56 Maine, 129 ; *Hinkley v. Buchman*, 5 Cal. 53 ; *Bean v. Parker*, 17 Mass. 591 ; *Whittaker v. Sumner*, 7 Pick. 551 ; *Reeves v. Reeves*, 33 Miss. 28.

⁴ *Shively v. The United States*, 5 Watts. 332.

⁵ *Thurston v. Spratt*, 52 Me. 202.

judgment by the plaintiff, where the former defendant could have pleaded it as a defense.¹ So an action by a sheriff upon the bond given by the deputy sheriff, on receiving his appointment to indemnify the sheriff against his acts or omissions as such deputy. The surety in such bond is estopped by a verdict against the sheriff in an action brought against him for the neglect of the deputy, of which action the deputy had notice and which he defended, although no notice of the action was given to the surety. This is on the principle that the surety is necessarily a privy at law, as his bond was for the purpose of indemnifying the sheriff against just such acts and omissions, and made himself privy to any action which might arise.² So a decree awarding money paid into court to one of several contesting execution creditors, is, if unreversed and unappealed from, conclusive that the party to whom it is awarded is, and that the contestants are not entitled thereto, and all matters litigated therein can not be examined in a collateral action, such as an action brought by the sheriff on a bond of indemnity taken from one of the contestants.³ So a railroad company which has been notified of the pendency of an action for an injury occasioned at a railway crossing, and requested to defend the action, is bound by the judgment, and it is conclusive against them, as to the cause of the injury and extent of the damage, whether they appear in the case or not.⁴ So in a *scire facias* upon a sheriff's official recognizance, the previous judgment of the claimant is conclusive of the claimant's right of a judgment against the sheriff and his sureties, as against all the defenses that the sheriff might urge as against him alone, except when it is a judgment against the sheriff by default.⁵ So a verdict and judgment against a city in an action for personal injuries occasioned by a defect within the limits of a highway, are conclusive evidence in a subse-

¹ Child v. Eureka Works, 45 N. H. 547.

² Fay v. Ames, 44 Barb., 327.

³ Noble v. Copes Achus, 50 Penn. St. 17.

⁴ Veazie v. Penobscott R. R. 49 Me. 119; Andrew v. Davidson, 17 N. H. 413; Colburn v. Pomeroy, 44 N. H., 19.

⁵ Bradley v. Chamberlain, 35 Vt., 277; Chamberlain v. Godfrey, 36 Vt., 380.

quent action by the city against the tenant of the land, who had notice of the pendency of the suit, and of the city's intention to hold him responsible for all damages recovered therein, and had an opportunity to furnish evidence, and testified at the time of trial, although he was not requested to, and did not take upon himself the defense of that action, that the highway was defective, that the person was injured there, while using due care, and of the amount of the injury; but not of the tenant's liability to keep the place in repair, nor of his having neglected to do so, nor of such negligence having been the sole cause of such injury.¹ Ordinarily the judgment of a court of competent jurisdiction is conclusive between parties to it. One who is neither a party or privy, or purchases *pendente lite*, is not bound, but he who purchases during the pendency of the suit is bound by the decree that is made against the person from whom he drives title.² So a judgment confirming a mechanic's lien is conclusive upon the parties thereto, and claiming under and in privity with them; and it is not necessary to make a mortgagee or encumbrancer by a lien of a different kind, a party in order to bind them by such a judgment.³

SEC. 59. Every person is entitled to his day in court, before his rights can be concluded by its judgment. Those only, who, in some manner recognized by the forms of law, become parties or privies to the record in a suit, can be concluded by the judgment therein.⁴ As I have already stated the parties in the legal sense, are all persons having a right to control the proceedings, to defend, to adduce, and cross-examine witnesses, and to appeal from the decision,⁵ if any appeal lies. On this principle, the lessor of the plaintiff in ejectment, and the tenant, are the real parties to the suit and are concluded in any future action in their own names, by the judgment in that suit. So, if there be a

¹ *Boston v. Worthington*, 10 Gray, 496.

² *Commonwealth v. Dieffenbach*, 3 Grant, 368; *Walden v. Bodley's heirs*, 9 Howd, 34; *Society v. Town of Hartland*, 2 Penn. St. 536; *Haynes v. Colderwood*, 23 California, 409.

³ *Ste v. Ead's*, 15 Iowa, 114.

⁴ *Aams v. Filer*, 7 Wis. 306.

Caey v. Emmons, 9 Wis. 114.

trial between A.'s lessee and B., who recovers judgment, and afterwards another trial of title to the same lands, between B.'s lessee and A., the former verdict and judgment will be admissible in evidence in favor of B.'s lessee, against A. ; for the real parties in both cases were A. and B. The case of *privies*, previously mentioned, is governed by like principles to those which have been stated in regard to parties ; the general rule is, that the person who represents another, and the person who is represented, have a legal identity ; and whatever binds the one, in relation to the subject of their common interest, binds the other also. Thus, a verdict and judgment, for or against the ancestor, binds the heir. So, if several successive remainders are limited in the same deed, a judgment for one remainderman is evidence for the next in succession. But a judgment, to which a tenant for life was a party, is not evidence for or against the reversioner, unless he came into the suit upon *aid prayer*.¹ A judgment in trespass against one who justifies as the servant of A., is evidence against another defendant in another action, it appearing that he also acted by the command of A., who was considered the real party in both cases.²

SEC. 60. An assignee is bound by a judgment against the assignor prior to the assignment. There is the like privity between the ancestor and all claiming under him, not only as heir, but as tenant in dower, tenant by the curtesy, legatee, devisee, etc. A judgment of ouster, in *quo warranto*, against the incumbent of an office, is conclusive evidence against those who derive their title to office under him. Where one sued for diverting water from his works, and had judgment ; and afterwards he and another sued the same defendants for a similar injury, the former judgment was held admissible in evidence for the plaintiffs, being *prima facie* evidence of their privity in estate with the plaintiff in the former action. The same rule applies to all grantees, they being in like manner bound by a judgment concerning the same land, recovered by or against their grantor, prior

¹ 1 Buller Nisi Prius, 232.

² Kinnersly v. Orpe, 2 Doug. 57.

to the conveyance. So, a plaintiff who indemnifies an officer, and defends an action of trespass against him, is estopped by the judgment; and a party having an interest in a suit who intervenes in the suit, and judgment is rendered against him, it is final, and even equity will not relieve against it;¹ and a recovery of a judgment against a sheriff, by the owner of property attached for the debt of a stranger, the suit being defended by the attaching creditors, is conclusive in another suit between the same parties. A private party is estopped by a suit against a corporation, for an act of negligence, if he knew of the suit, and could have defended it, as an express notice is not required;² and while persons not parties are not estopped by a decree, yet, if they wish to derive any benefit from it, are compelled to admit its validity; they are bound by the estoppel, because they cannot accept part and reject part of an entirety.³ A judgment of foreclosure does not bind the assignee of the mortgagor, unless he was a party to the suit.

SEC. 61. A judgment in trespass or trover will not *transfer the title* of the goods to the defendant, although it is pleadable in bar of any action afterwards brought by the same plaintiff, or those in privity with him, against the same defendant, or those in privity with him. And as to the original parties, the rule, applicable to all personal actions, is, that wherever two or more are liable *jointly* and not *severally*, a judgment against one, though without satisfaction, is a bar to another action against any of the other for the same cause; but it is not a bar to an action against a stranger. As far as an action in the form of tort can be said to be exclusively joint in its nature, this rule may govern it, but no further. In regard to joint contracts, a judgment against one alone is a bar to a subsequent action against the other. A judgment in trover or replevin by or against a bailee, can be pleaded as an estoppel to another action for the same subject-matter, by the bailor. A bailee who delivers goods entrusted to his care to a third person in good

¹ *Ingraham v. Dawson*, 20 How. 186; *Lovejoy v. Murray*, 3 Wallace, 1.

² *Chicago v. Robbins*, 4 Wall. 657; *Chicago v. Robbins*, 2 Blackf. 418.

³ *Gordon v. Hobart*, 2 Sum. 402.

faith, believing him to be the rightful owner, may take advantage as an estoppel to an action brought against him by the bailor, of the judgment against the bailor in an unsuccessful action by the latter against the party to whom the goods were surrendered.¹ Upon this principle, the equitable assignee of a chose in action has been estopped by a verdict and judgment thereon, in the same manner as if he were a party to the record, the suit having been prosecuted in the name of another for his benefit, and at his request and expense.²

SEC. 62. A judgment against two joint debtors in an action of debt estops both in an action of one against the other, from denying the existence or obligation of the debt, without interfering with the right to prove that the whole burden of the obligation should be borne by the party who seeks to enforce it.³ A defendant who claimed under a *donatio mortis causa*, was held to be within the estoppel of a judgment obtained by a creditor of the donor against his administrator, and estopped from showing fraud and collusion, or that there was no such debt as that sued upon.⁴ Generally no one can be within the estoppel of a judgment as a privy, unless his title accrues after the rendition of the judgment.⁵ A vendee or assignee will therefore not be concluded by a judgment against the vendor or assignor prior to the sale or assignment. But to this rule there is an exception, that is, in cases of judgments *in rem*; as they are conclusive upon the whole world, they must necessarily be binding upon the assignee, regardless of the time of assignment.⁶ In equity, all who acquire title to real estate from a defendant during the pendency of a bill to establish a right, or for the enforcement of a trust that is distinctly alleged in the bill, are affected with notice and are bound by the decree rendered against the vendor,⁷ while a judgment in an action of ejectment is conclusive evidence of title in a subsequent action for *mesne* profits, against all claiming under

¹ Burton v. Wilkinson, 18 Vt. 126; Bates v. Stanton, 1 Duer 79; Story on Bailments.

² Rogers v. Haines, 3 Greenleaf, 362.

³ Lloyd v. Barr, 11 Penn. 41.

⁴ Mitchell v. Pease, 7 Cushing, 350.

⁵ Campbell v. Hall, 16 N. Y. 575.

⁶ Peck v. Barnum, 24 Vt. 376.

⁷ Leading Cases in Equity, 171.

or through the defendant as purchasers during the litigation and while the estoppel, is limited only to the profits of the land ; it does not bind or embrace the title.

SEC. 63. A party is estopped by a judgment against him from disputing its correctness, so far as the point directly involved in the case was concerned ; whether the reasons upon which the judgment is based were sound or not ; and even if the reasons were not given. And as the parties themselves are estopped, so also are those who since the judgment, claim to have acquired interests in the subject-matter of the judgment from or under the parties.

CHAPTER IV.

JUDGMENTS IN PERSONAM.

SECTION 64. In ejectment, the verdict and judgment is conclusive, of the title to the lessor of the plaintiff to *mesne* profits accruing after the day of the demise, during such time as the defendant has held the premises in question.¹ The statutes of New Jersey declare a judgment in ejectment conclusive as to the right of possession established by such judgment, upon the party against whom it is recovered, and upon all persons claiming from, through or under such party, by title arising after the commencement of such action, but provides that, in certain cases, it may be reopened in three years. In Pennsylvania, in order to give the conclusive effect on parties to a judgment in ejectment, it must appear that the equitable title was directly in issue and decided upon;² and upon a judgment in ejectment to enforce or rescind a contract for the sale of land, one that is conclusive upon the rights of parties, whether the judgment is entered on the verdict of a jury or on an award of arbitrators;³ it must be regularly entered upon the record. In Ohio, a judgment in ejectment is as conclusive as judgments in other actions, until reversed for error, or annulled by an adverse recovery in a subsequent suit,⁴ and also in Minnesota,⁵ and are made conclusive by the statute in Iowa, but apply only to interests existing at the time of trial. In Kentucky, if in an action for the recovery of land, a claim is set up for rents, issues and profits thereof; it is a bar to another and separate suit for rents, although the judgment is not a bar to a recovery for anything that he had a right to recover, which was not claimed in the petition, for the recovery of the land.⁶ In Tennes-

¹ Den v. McShane, 13 N. J. Law 496; Arick, v. Ogler, 25 Penn. 506. R. 35.

⁴ Hinton v. McNeil, 5 Ohio, 509.

² Meyers v. Hill, 46 Penn. 9.

⁵ Bass v. Arper, 6 Minn.

³ Sertzing v. Ridgway, 9 Watts,

⁶ Walker v. Mitchell, 18 B. Mon. 541.

see, the judgment is conclusive upon the party against whom it is recovered, and by title accruing after the commencement of the action, on all claiming under and through him, provided the person against whom the judgment is recovered is not under disability at the time ;¹ and the general well-settled rule is, that judgments in ejectment have the same effect as all other actions, and binds parties and privies thereto, upon the subject-matter directly in issue, but will not bind strangers.

SEC. 65. There is no distinction in ejectment between a judgment by default and one obtained by a verdict. In the one case the right of the plaintiff is confessed, in the other it is tried and determined. Although when the fictitious forms in ejectment are abolished by statute the action is placed on the same basis as other actions in regard to the conclusiveness of judgments, and courts give them the same effect. Yet were a plaintiff defeated in one action he will not be estopped in another action, where he claims under a new deed. Having a new title, he has the same right to assert it without prejudice from the former suit that a stranger would have.² In South Carolina, by the act of 1744, if the plaintiff in an action of trespass to try title, suffers a judgment against him, or is nonsuited, or discontinues, or otherwise drops his action, he must within two years thereafter commence a second suit, or else he is barred and estopped of his right and title, and as against him the title is absolutely vested in the defendant.³ If the validity of a mortgage be tried and adjudicated in a suit in chancery, the decree binds parties and privies in an action of ejectment on the same mortgage.² Where the action of ejectment is brought for the purpose of settling the title, and to establish the right of property, as well as to recover possession, the judgment is conclusive upon all parties.⁴ In Illinois, Vermont and Arkansas one verdict and judgment in ejectment is conclusive of the title.

¹ Tennessee Code.

Sturdy v. Jackway, 4 Wall, 174; *Bar-*

² *Barrows v. Kindred*, 4 Wallace, 399.

399.

³ *Smith v. Kernochan*, 7 Howard

⁴ *Dyson v. Leek*, 5 Strob. 141; 198; *Tyler v. Hyde*, 2 B. C. R. 308.

SEC. 66. In actions for *mesne* profits the judgment in the ejectment suit is conclusive evidence against the tenant in possession, but not as to third persons,¹ and is conclusive evidence for the plaintiff against the defendant or any person claiming under or through him,² and the defendant is estopped in an action for *mesne* profits from setting up any defense which would have been a bar to the action of ejectment; he cannot set up a title in bar of the action even if he has a better one than the plaintiff.³ If the plaintiff in the action for *mesne* profits endeavors to recover for those which accrued antecedently to the day of the demise laid in the declaration in the ejectment, he cannot introduce the judgment in ejectment as evidence for him. A judgment in ejectment, like all other judgments, binds only parties, and privies; a tenant is *concluded* by the judgment in ejectment and cannot controvert the title. But where the action is brought against third parties, against persons who are neither parties or privies to the record, the judgment loses its conclusive effect, and they may controvert the plaintiff's title; it proves the plaintiff's possession, and this he can establish by introducing the record of the judgment and an executed writ of possession under it.⁴ But where it is against the tenant he cannot controvert the plaintiff's *possession* any more than his title, for the reason that his possession is *part* of his title; for to entitle the plaintiff to recover, he must show a possessory right not barred by the statute of limitations. The judgment in the preceding action of ejectment, like all others, estops parties and privies only as to the subject-matter of it and proves nothing at all beyond the time laid in the demise.⁵ In a *writ of entry*, whether the fact of *non-tenure* seasonably pleaded by several tenants be established the admissions of the defendants or a judgment, the effect as far as the tenant is concerned operates as an estoppel of record.⁶

¹Chirac v. Reinecker, 11 Wheat. 280; Fisk v. Miller, 20 Tex. 581.

²Poston v. Jones, 2 Dev. & Bat. 294.

³Tyler on ejectment, 844 and cases cited

⁴Chirac v. Rienecker, 11 Wheat. 280.

⁵Aslin v. Parker, 2 Burr. 665.

⁶Hotchkiss v. Hunt, 56 Me. 252.

SEC. 67. In California, in an action of ejectment under the practice act, a judgment is conclusive upon the question of title, in a subsequent suit between the same parties and their privies, where the title has been put directly in issue and determined in the first suit.¹ Where, under the laws of Maryland, an issue is directed by the probate court, as to the legitimacy of the person who claims to be appointed administrator of the estate of an intestate, on the ground that he is the intestate's nephew, the finding thereon is conclusive upon the question of legitimacy, as between the parties in an ejectment suit subsequently brought by the claimant.² A state statute, enacting that a judgment in ejectment (provided the action be brought in a form which gives precision to the parties and land claimed), shall be a bar to any other action between the same parties on the same subject-matter, is a rule of property as well as practice, and being conclusive on title in the courts of the State, is conclusive also in those of the United States.³ A judgment in ejectment binds the parties and their privies, and estops them from denying that the plaintiff was entitled to the possession of the premises at the time of its rendition. Privies are those who enter under the defendant in ejectment, or acquire an interest in or through him, or in collusion with him.⁴ So where a plaintiff has been restored under a writ of restitution to the possession of the demanded premises in an action of ejectment the, defendant so evicted is estopped at law to deny that the plaintiff was rightfully restored and that his own prior possession was wrongful.⁵ If, in an action of ejectment against a tenant, the landlord assumes the defense and puts his title in issue, the judgment rendered therein binds him as effectually as though he was made a party defendant.⁶ A joint judgment in ejectment against several, if reversed as to one, is reversed as to all; it is either void *in toto*, or not at all.

¹ Copeton v. Schmidt, 25 Cal. 479.

⁵ Mann v. Rogers, 35 Cal. 316.

² Blackburn v. Crawfords, 3 Wall. 175.

⁶ Valentine v. Mahoney, 37 Cal. 389; Caldewood v. Brook, 28 Cal.

³ Miles v. Caldwell, 2 Wallace, 35.

126; Dunvick v. Denyer, 32 Cal.

⁴ Satterlee v. Bliss, 35 Cal. 489; 488.

Marshal v. Shafer, 32 Cal. 176.

SEC. 68. When a plaintiff avers title and right of possession in himself, and the defendant denies these allegations, and on the other hand avers title and right of possession in himself, the title is *prima facie* in controversy; and in such a case the judgment operates as an estoppel in any future litigation between the same parties, unless it should be shown that one of the parties was prevented from making his title available in the former suit by some temporary impediment, such as an outstanding lease or license, or that he had acquired some new title since the former judgment.¹ The doctrine that a judgment cannot be pleaded in bar or given in evidence by way of estoppel, arises from the fact that the action of ejectment at common law is between fictitious persons, and has no applicability to one action for possession of real property, which is more like the writ of entry or assize than the old action of ejectment. One action, although called ejectment, seems to combine the properties of a writ of assize, of entry and of right, and as such, a judgment in an action is an estoppel in regard to all titles litigated. But where, since the judgment, new rights and titles have accrued, it is no bar to another action. In States where the fictitious form of the action of ejectment formerly in use has been abolished, and issue is made by the parties in their real names, and the land is accurately described, a verdict and judgment in such action, where the title to the fee is in question, is a bar to a second trial for the same cause of action between the same parties in the absence of statute law to the contrary. But in Missouri it was decided (owing to a repeal of the statute) that there was no bar in such actions.²

SEC. 69. A confession of judgment in ejectment is conclusive in a subsequent ejectment for the same land between the same parties or their privies. It must be treated upon the same general principles of law that belong to solemn or judicial confessions in other cases. The most important interests, not only property and liberty, but life itself, are habitually concluded judicially by solemn confessions made

¹ *She'ly v. Dilley*, 3 Nevada, 21.

² *Fenwick v. Gill*, 38 Mo. 510.

by the party in interest in the face of a court of justice. Is there any reason why ejectment should form an exception? In the nature of things, the interests involved in an ejectment suit are no more beyond the power of the party to control by his confession, than any other rights of person or property. If he may confess his guilt in a capital case, he may most assuredly confess his want of title in ejectment, and a judgment confessed concludes and estops him and all his privies; this not upon the effect of the statute, but of the general principles of common law. It is a voluntary waiver of all defenses, and of all rights under the statute or at common law—a total and unconditional surrender of the field of controversy which concludes him forever.¹ And where the attorneys of both parties in an action of ejectment enter into an agreement in open court, submitting a question of boundary to the final decision of arbitrators, the award of the arbitrators and judgment thereon is conclusive in another action of ejectment between the same parties for the same land.² A disclaimer by a defendant in ejectment, unless withdrawn or amended by leave of court, operates as an estoppel of record of the part of the land disclaimed.³

SEC. 70. In regard to the conclusiveness of judgments in actions of ejectment, there is a vast difference in the different States in the Union in the value attached to real estate, and to the title by which it is held, as compared with other species of property. But there can be no doubt that in all of them the feeling is far removed from that which formerly prevailed in England, or which prevails there even now, while some of our older States still maintain many of the safeguards of the common law, with its complicated system of conveyancing operating as a strong drag upon the facility and frequency of transfers of real property; in the Western States, the inhabitants traffic in land as they do in horses or merchandise, and sell a quarter section of

¹Seerist v. Zimmerman, 55 Penn. St. 446.

³Greely v. Thomas, 56 Penn. St. 37.

²Evans v. Kauphaus, 59 Penn. S. 379.

land as readily and easily as they do a horse or wagon. The laws of the people correspond with their habits. Deeds of conveyance are, by statute, rendered exceedingly simple and effectual, the main safeguard being a well-digested system of registration. In consonance with this general facility for traffic, it is their policy to prevent those endless litigations concerning titles to land, which, in other countries, are transmitted from one generation to another. The rapid settlement of a new country requires that a title once fairly determined, shall not be again disturbed as between the same parties.¹

SEC. 71. Ejectment is a possessory action ; the judgment, therefore, is not conclusive upon the mere right or title, and cannot be pleaded in any subsequent suit, whether of ejectment or trespass, in which the title is in controversy ; while a judgment in trespass may be an estoppel in a subsequent ejectment, the estoppel of the judgment in ejectment does not extend to the title ; it is limited only to the right of possession, and is conclusive in regard to that only, till reversed or set aside in another action of the same nature. The defendant in an action of ejectment, against whom a judgment has been recovered, cannot deny the plaintiff's title in an action for *mesne* profits, for the simple reason that the only question in controversy in the action of ejectment was the plaintiff's right of possession, and not the absolute right to the land. A verdict and judgment for the plaintiff in action for trespass *quare clausam fregit*, in which the question of the plaintiff's title was directly involved and adjudicated upon, will be conclusive evidence that he has a valid title in another action against the same defendant.

SEC. 72. The case of *Outram v. Morewood* (*ante*), it was decided, where parties are bound by the estoppel of a former judgment in such an issue, when raised on the record in pleading, they must be equally bound, when it arises on the trial under the general issue.² So, in an action on a promissory note, where the defense was fraud, and the judgment was rendered for the defend-

¹ *Mills v. Caldwell*, 2 Wallace, 43.

² *Small v. Haskins*, 26 Vt.

ant, the verdict was held, in another action on another note growing out of the same transaction, conclusive evidence of the fraud.¹ So, an action for interest due on a bond and a judgment for the plaintiff for the amount of the interest claimed, will be conclusive evidence in an action on the bond, and estop the defendant from alleging fraud, for the reason that it was a defense which was available in the former suit, and the presumption is that it was so used;² and on the same principle in an action of assumpsit for goods sold and delivered, a verdict against the vendee on the ground that the sale was fraudulent as against the vendor's creditors, is conclusive of fraud in a subsequent action between the same parties, for other goods which were not included in the first action. So a judgment against a firm, on a note made by one of the partners, will be conclusive evidence of the existence of the partnership, the making of the note, and the right of the partner to bind the firm in a subsequent action brought by one of the firm, to recover damages from the plaintiff in the former action for fraudulently taking the note for the individual debt of the maker, and the court held that the estoppel of the former judgment beyond the fact of the making of the note and the right to bind the firm, would not prevent a recovery in an action for damages, provided it could be done without controverting the issues which had been irrevocably settled in the first action.³ So a decision that a bankrupt's discharge was fraudulently obtained, is conclusive of the fraud in another action where the discharge is pleaded. In an action for forcible entry and detainer, a judgment for the plaintiff will be conclusive as to the lawful possession of the land in an action for assault committed by the defendant at the time of entry, where the defendant attempts to justify on the ground that the legal possession is in him and not in the plaintiff; it may be laid down as a settled principle that whenever a judgment cannot be rendered without deciding specific issues, it will be conclusive on those issues in any

¹ Doty v. Brown, 4 N. Y. 71; Chase v. Walker, 26 Me. 555; Whirch v. Howard, 14 Ind. 455.

² Edgell v. Segerson, 26 Mo. 583.

³ Christran v. Pierce, 7 Geo. 434.

future litigation between the same parties;¹ and where a judgment is rendered on one of two notes, it will be conclusive in an action on the other of the matters litigated and decided in the first, though it has to be shown by parol testimony, the record being silent on the matter. It makes no difference whether the judgment is on a question of law or fact, for whenever the construction of an instrument has been judicially determined, it must be followed in every other action where the same issue arises between the same parties.²

SEC. 73. When a former judgment is used by way of an estoppel, the plaintiff may reply, that it did *not relate* to the same property or transaction in controversy in the action, to which it is set up in bar; and the question of identity thus raised is determined by the jury, upon the evidence adduced. And though the declaration in the former suit may be broad enough to include the subject-matter of the second action, yet, if, upon the whole record it is doubtful whether the same subject-matter was actually passed upon, parol evidence will be admitted to show the truth. If, in the pleadings, there are several distinct counts, the evidence may have referred to either, or all, with equal propriety; the judgment, in such a case, is only *prima facie* evidence upon any one of the counts, and evidence *aliundi* is admissible to rebut it. Where one wrongfully takes another's horse, and sells him, applying the money to his own use, a verdict and judgment in trespass, in an action by the owner, for the taking, will be effectual as an estoppel in an action of *assumpsit* for the money received, or for the price, the cause of action being proved to be identical. And upon this same principle, if a plaintiff declares on the counts, as, for instance, one on a promissory note, and the other for goods sold, and takes a judgment for the note, but offers no evidence on the other count, it will not be a bar to another action for goods sold; but if the plaintiff had adduced evidence on the count for goods sold and delivered, and the judgment had

¹ Bell v. Walker, 18 Conn. 91; Perkins v. Walker, 19 Vt. 144; Gardner v. Buckbee, 3 Cow.; Treadwell v. Stebbins, 6 Bos. 538.

² Stewart v. Stebbins, 20 Miss. 66.

included this with the other demand, it can be pleaded as a judgment recovered upon the same cause of action; if the real merits of the action are not decided in the first, the prior judgment is no bar.¹ Generally, where questions of this kind arise, regulating the identity of the matters litigated in the former suit, parol evidence is admissible, to show what transpired on the former trial, in order to explain the record; and if the record shows that the same cause of action was apparently determined in the first suit, it will be *prima facie*, but not conclusive evidence that it has passed *in rem judicatum*; and the burden of proving that it did not, is upon the party against whom the record is used. Hence, in order to know what is within the estoppel of a judgment, it is necessary to go beyond the judgment, first to the demand or cause of action, and next to the defense or answer made by the defendant, and regard every question as finally adjudged against the unsuccessful party, which would have the effect of an estoppel for him, if determined in his favor. This is the rule, where the point is set forth definitely on the record, and also where the general issue is substituted for the special plea, where the questions raised by the evidence and presented to the jury can be ascertained with certainty, from the testimony of witnesses or the decision of the judge before whom the cause is tried. A fact is not less at issue or within the conclusion of the verdict, because it is comprised in a general traverse or averment, and the only difference between the cases, where the issue is general, embracing various matters, and those where it is limited to a single point, is, that the estoppel, which appears by the mere inspection of the record in the one case, must be made out by evidence in the other; so that, when what was actually decided in a former suit can be ascertained by parol evidence, it will be an estoppel, notwithstanding the ambiguity of the record, or a change in the form in which the question is presented. So, a verdict for the defendant in an action brought for the recovery

¹ Seden v. Tutop, 6 Term. R. 607; Bagot v. Williams, 3 B. & C. 240; Thorpe v. Cooper, 5 Bing. 129; Snider v. Croy, 2 Johns. 277; 2 Starkie Ev. 199; 2 Phil. Ev. 21.

of a chattel, which was conveyed by a deed, which is put in evidence at the trial, and relied on as a source of title, will be conclusive of the validity of the deed in a subsequent suit for another chattel comprised in the same instrument.¹ When a question litigated in a second suit is the same as that decided in the first, the estoppel will not be less binding, because the cause of action is different, and the identity of the points actually in dispute cannot appear without extrinsic proof. So, where a decision that the defendant did not owe the plaintiff contribution on one bond, was held to estoppel him from recovering it on another, given at the same time and in course of the same transaction, although parol evidence was necessary to apply the bar of the former proceeding to the demand in suit.²

SEC. 74. In the case of *Sheldon v. Edwards*,³ the learned judge says, "that the question whether the former suit and judgment thereon was bar to the action, depends upon the question whether it was a judgment upon the whole merits. The same defense was set up in the answer there, as in this suit. The facts were particularly found there, though not all precisely as they are in this suit. On the judgment there can be no dispute or denial that both issues were distinctly passed upon, found and adjudged; the same defense was pleaded, the facts found and the law adjudged. Why then was it not a bar to this action? It is said that where the action is dismissed or judgment given for the defendant upon a preliminary point before reaching the merits, it is no bar to another action.⁴ No one can dispute the soundness of the rule, but these cases have no sort of application to this one. Take a plainer case: an action is brought upon a draft before the days of grace had expired. The defendant answers: first, that the draft is usurious; second, that it was paid: third, that it was premature. The defendant being entitled to grace, the court found each issue for the defendant, and judgment was accordingly entered. Can any court assume to say that the judgment was given upon one

¹ *Doty v. Brown*, 4 N. Y. 71.

⁴ *Hughes v. Blake*, 1 Mason, 515;

² *Borchard v. Dias*, 3 Denio, 233.

Estell v. Farel, 2 Yerg. 467.

³ 35 N. Y. 285.

issue more than upon another, when the record shows it was given alike upon all? Can it be denied that each of these issues was tried and adjudged? What court then can detract from the power or force of the consequences flowing upon such judgment upon the issues? It is stated that estoppels must be mutual; that if these issues upon the merits had been found the other way, and the complaint dismissed because the action was prematurely brought, there would have been no estoppel against the defendant from trying them again if another action was brought. This seems plausible, but I think unsound. It is the judgment upon the findings that makes the estoppel. If the judgment be one of nonsuit, or in the nature of a nonsuit, and the action be dismissed, nothing whatever is adjudged in respect to a subsequent suit. It is no bar to anything: an action is brought on a draft, and the plaintiff, after evidence on both sides, is nonsuited, judgment of nonsuit entered and paid. The next day he brings the same action again, and succeeds; the former of course being no bar. But suppose, instead of a nonsuit, the judgment had been for the defendant upon the merits, because he failed to prove the defendant's handwriting, it is equally clear that the judgment would have been binding and a bar, whether it was founded on the finding of a court or referee or the verdict of a jury."

SEC. 75. What is meant by an estoppel being mutual is, that the particular judgment is binding upon both, if obligatory upon either. The merits having been determined in the former suit, and judgment entered thereon, it is conclusive upon both parties until reversed. It is entirely mutual.¹ In order that a judgment in another action between the same parties shall constitute an estoppel, it should appear that the identical questions involved in the issue tried were passed upon by the court or jury at the former trial.² It must, therefore, be clearly evident that a former judgment cannot operate as an estoppel to another action, unless the subsequent suit is not only founded upon the same contract or transaction as that litigated in the first, but that the sub-

¹ 35 N. Y. 286.

² *Kerr v. Hays*, 31 N. Y. 271.

sequent action is brought for the wrong or redress which the party sought in the first action.¹ So, a judgment for a defendant in action brought to recover damages, for an alleged deception in inducing the plaintiff to enter into a contract, can be no defense to an action on the contract² or on a bond given for the fulfillment of the contract, because a judgment that a contract was not procured or void, for fraud can be no reason why it should not be enforced.³ Every fact which exists on record must be proved by the record, but when the question is as to the real subject-matter of the suit, or to show a bar to another suit, or to lay the foundation of an action of indemnity, the identity of the cause of action may be proved by other than record evidence.⁴ Whether any matter has been tried between the same parties, and has been decided before, is a fact depending partly on parol evidence and partly on the record. But while a record can be explained, it cannot be added to or contradicted, and where a record distinctly shows what matters were in issue and decided, parol evidence will be allowed to show that other matters not within the issue were likewise adjudicated.

SEC. 76. But where a plaintiff brings an action against a defendant, and the declaration contains several causes of action, and he gives evidence on all the counts, but for want of evidence fails in establishing some of them, the judgment is an estoppel to another action on the counts he has failed to sustain, and if a claim is submitted to a jury, and they disallow it or allow less than the plaintiff is entitled to recover, the verdict and judgment is a conclusive bar to another action for the same cause.⁵ Where the plaintiff's claim is divisible, part of it can be withdrawn and another action brought, but where it is indivisible, the defendant cannot be vexed by having it split up into separate causes of action; and a judgment in a suit for part of a claim is a bar to

¹ *Tams v. Lewis*, 42 Penn. St. 402.

² *Wanzer v. Debaun*, 1 E. D. Smith, 261; *Norton v. Doherty*, 3 Gray, 72.

³ *Finley v. Hambest*, 30 Penn. St. 190.

⁴ *Parker v. Thompson*, 3 Pick. 429; *Killhoeffler v. Herr*, 17 S. & R. 319.

⁵ *Brockway v. Kinney*, 25 Johns. 210; *Phillips v. Berriek*, 16 Johns. 136.

another action for the remainder. Parol evidence is not admissible to show that matters *prima facie* within the estoppel of a judgment, are exempt from its operation. When the cause of action upon which the judgment is rendered is entire, and therefore insusceptible of severance or apportionment the estoppel extends to the whole, and it cannot be shown that any part was withheld from the decision of the court or the jury. So inflexible is this rule, that even on the clearest proof that no evidence was given as to part of the demand in controversy, or that it was overlooked by the jury in rendering their verdict. Thus, where several actions for trover were brought for the taking of several articles of goods at the same time and by one act, it was held that a judgment for part of the articles was a bar to another action for the residue.¹ So, where trover was brought for a horse, it was held that trespass for taking the same could not afterwards be maintained, for in trespass he might have recovered damages for the force and violence for taking the horse, yet, having elected to bring an action for the horse only, or for its value, he is bound by his election, and not allowed to carve two suits out of the same cause of action.² So, for an entire contract for the payment of money, or for the sale of goods, and an account for goods sold and delivered, consisting of several distinct items, delivered at different times, but all due, is an entire demand within the meaning of this principle, and a recovery for a part is a bar to any action for the residue.³ And where a party brings an action for part of an entire and indivisible demand, and obtains judgment thereon, he cannot afterward avail himself of the *residue*, by way of set-off in an action against him by the opposite party.⁴ Nor can a party, by assigning part of his claim to another, divide an entire cause of action, nor by any means sustain more than one suit on it, and if two suits be brought, a recovery in the first will bar the

¹ Draper v. Stounel, 38 N. Y. 211; Farrington v. Payne, 15 John. 431; Bates v. Quattlebom, 2 N. & Mc. 205.

² Hite v. Long, 6 Rand, 457.

³ Bunuel v. Pinto, 2 Conn. 431; Guernsey v. Carver, 8 Wend. 492.

⁴ Miller v. Covert, 1 Wend. 487.

second;¹ as an entire cause of action cannot be divided, a judgment for or against the plaintiff for a portion will be as conclusive against his right to maintain another action for the balance, as though the judgment had embraced the whole. In the case in the 24th Penn.,² the judge said the rule that prevents a party from splitting up his cause of action into small payments, takes away his remedy for the residue entirely, and having once claimed by action or defense a part of an entire subject-matter, the law allows him no remedy for the other part, else there could be no end to litigation.

SEC. 77. A party cannot divide and recover in parts in different actions, a claim which in its legal nature is indivisible. The difficulty which is often experienced is increased rather than diminished, if courts are to rely on the doctrine of *stare decisis* in making their decisions. That a party shall not be allowed to split up an entire and indivisible claim and recover upon it in fragments in different actions, is itself palpably reasonable and is well enough settled. A party should not be vexed with a multitude of suits for one and the same cause of action. There can be no reason given why he should be, but sufficient and numerous reasons he should not *nemo debet bis vexari pro una et eadem causa*, and *interest reipublice ut sit finis litium*; if a party divide a single and entire cause of action once, what limit is there but the caprice and will of the party to endless divisions? for what depends upon the mere caprice or will of an adversary, may be said to be without limit. To allow a single claim to be divided and recovered in parcels would be instituting an unreasonable doctrine that would necessarily lead to vexatious and endless litigation. To effectually prevent this the law wisely holds that a party cannot recover in parts a claim which in its legal nature is indivisible. So where a plaintiff brings an action of trespass or trover for one of several chattels carried off or converted at the same time, or for any other indivisible act or

¹ Ingraham v. Hall, 11 S. & R. 78.

² Secor v. Sturgis, 16 N. Y. 548; Sims v. Zane, 24 Penn. St. 242.

wrong, and recovers judgment, it will be effectual as an estoppel to any future litigation by the same parties for the residue. So a judgment, recovered against one of two wrong-doers, is an estoppel to an action by the plaintiff against both. In *Farrington v. Payne*, a bed and quilts were taken at the same time and by the same act; a recovery in trover for the quilts was held to be a bar to a recovery in trover for the bed. As the same rule is applicable in actions of contract, a vendor who sells goods at the same time and place to the same person, cannot multiply costs in bringing as many actions as there are parcels, but must include the whole in one action, even when they were delivered at different periods.¹ The amount due on a book account is regarded as one debt, although it may be composed of a hundred charges; it would be gross injustice to allow the creditor to divide it into as many actions or demands as there are items in the account; and it is for this reason that such claims are generally regarded as entire and indivisible.² So, an entire demand for goods sold at one time, although in different parcels or barrels, or upon a contract for the payment of money in a gross sum and at one time, whether as rent or any other indivisible consideration, cannot be apportioned or severed, and if once made the subject of a judicial decision will be absolutely and forever extinguished, notwithstanding it can be shown by the clearest proof that part of the demand was withheld and that the judgment which was rendered was only for the residue of the amount in litigation. This difficulty presents itself, and that is, to ascertain what is an entire demand; the rule is that all acts of the same nature performed at the same time are regarded as one act in law, and cannot be made the subject of several and separate actions where they are continuous instead of being simultaneous; the same rule

¹ *Draper v. Stouvenal*, 38 N. Y. 219; *Cracraft v. Cochran*, 16 Iowa, 300; *Farrington v. Payne*, 15 Johns. 432; *Phillips v. Berick*, 16 id. 136; *Cunningham v. Harris*, 5 Cal. 181; *Miller v. Covey*, 1 Wend. 487.

² *Avery v. Fitch*, 4 Conn. 362; *Bendernagle v. Cocks*, 19 Wend. 207; *Guernsey v. Carver*, 8 id. 492; *Warren v. Cummings*, 6 Cush. 103; *Senner v. R. R.* 26 Mo. 46; *Brown v. King*, 10 id. 57; *Sims v. Zane*, 24 Penn. St. 242; *Colburn v. Wentworth*, 31 Barb. 481.

applies unless it be shown by proof that they are distinct causes of action. In New York, it has been held that where goods are sold, services rendered or money received under such circumstances, that the different items while occurring at different times are but one transaction ; the cause of action will be entire and a recovery for any part will be conclusive against the right to sue for the balance.¹ So wages due for work and labor performed at different periods, under a general hiring or retainer, form but one demand, and cannot be severed by withdrawing the amount due for a particular month or week formally from the record in one suit, and making it the basis of another. The cause of action is not the less entire because the services were not continuous, but if there had been different hirings each one might have been a cause of action : so where a man paid by the day or week returns to his employer after a short absence, will not constitute a new contract, nor entitle him to bring separate actions for that which, although performed at different periods, is in the eye of the law one consideration. But where the consideration is distinct in nature, place or time, and unless the circumstances surrounding the transactions are such as to indicate that they are to be regarded as a whole and should be treated as an entirety, the onus is upon him who alleges the fact, and unless proven to be so it is not so considered.² The judge who delivered the opinion in 16 N. Y. stated that "the principle is settled beyond dispute that a judgment concludes the right of parties in respect to the cause of action stated in the pleadings in which it is rendered, whether the suit embraces the whole or only part of the demand constituting the cause of action. It results from this principle, and the rule is fully established that an entire claim, ensuing either upon a contract or from a wrong, cannot be divided and made the subject of several suits ; and if several suits be brought for different parts of the same claim, the pendency of the first may be pleaded in abatement of the others, and a judgment upon the merits in either will be available as a bar in other

¹ 8 Wend 492 ; 13 id. 644 ; 19 id. 207 ; 15 Wend. 537.

² *Sturges v. Secor*, 16 N. Y. 548.

suits. The true distinction between demands or rights of action are several and distinct, in that the former arises out of one and the same act or contract, and the latter out of different acts or contracts. Perhaps, as safe and simple a test as the subject admits of, by which to determine whether a case belongs to one class or the other, is by inquiring whether it rests upon one or several acts or agreements. In case of torts, each trespass, or conversion, or fraud, gives a right of action, and but a single one, however numerous the items of wrong or damage may be ; in respect to contracts, express or implied, each contract affords one, and only one, cause of action. The case of a contract containing several stipulations to be performed at different times is no exception ; although an action may be maintained upon each stipulation, as it is broken before the time for the performance of the others, the ground of action is in the stipulation which is in the nature of a several contract ; where there is an account for goods and labor performed, where money has been lent to or paid for a party at different times, or several items spring in any way from the same contract, whether only one or separate rights of action exist, will, in each case, depend upon whether each case is covered by one or separate contracts. The several items may have their origin in one contract, as on an agreement to sell and deliver goods, or perform work or advance money ; and, usually, in the case of a running account, it may be fairly implied that it is, in pursuance of an agreement, that an account may be opened and continued, either for a definite period or at the pleasure of both the parties. But there must be either an express contract, or the circumstances must be such as to raise an implied contract embracing all the items, to make them, when they arise at different times, a single or entire demand, or cause of action." When, however, simultaneous or successive contracts are so far different that they cannot be united, or described as constituting a single consideration in pleading, the contract will not be entire unless made so expressly ; and a party who lends money and sells goods, at the same time and place, to another, may either bring a joint or separate action, as he

may see fit. When several promises or covenants are contained in the same instrument, or where a covenant is made to pay money, from time to time, by installments, a separate action may be brought for each installment, as it falls due, on the several covenants when broken before the period fixed for the payment or performance of the others.¹ And as the defendant ought to have as much latitude as the plaintiff, he will not be estopped from taking advantage of a defense to an action brought under these circumstances, by having neglected to plead in a former action, when it would have been equally available.² And unless the stipulations in an instrument are essentially distinct, after the occurrence of several breaches, they must be made the subject of one action.³ Judgments, like all contracts, are vitiated by fraud. In the 12 Mich. the following decision was rendered in a case upon a bond: An insurance agent gave bond to his principal, conditioned to pay over and account for all moneys received by him as such. Judgment having been recovered by them on this bond, for money not accounted for and paid over, a *scire facias* was issued, assigning as a breach that the obligor had received a further sum of money for which he failed to account, and the receipt of which he fraudulently concealed; and on pleading the former judgment as an estoppel to the subsequent action on the same bond, the court held that the fraudulent concealment was sufficient reason for not including the sum in the original pleading, and rendered judgment in the subsequent action for the amount proved to have been concealed.⁴ So, a suit by an administrator *cum testamento annexo* against an executor who had been removed from his office for the assets remaining in his hands, is a bar to another action for the recovery of funds which have been received by the executor before the institution of the first suit, but are not included in the judgment, in consequence of a mistaken impression that they were not due at the time it was

¹ Seeor v. Sturgis, 22 N. Y. 548;
Perkins v. Hart, 11 Wheat. 251; Wolf
v. Wilton, 30 Penn. St. 202.

² Hughes v. Alexander, 5 Duer, 488.

³ Hoff v. Myers, 42 Barb. 270.

⁴ Johnson v. Provincial Ins. Co.

rendered.¹ But if the defendant fails truthfully to account for the assets in his hands, it is an indicia of fraud, and the former suit would not be a bar on account of fraud; but if it is a mistake of the plaintiff, without concealment and falsehood on part of the defendant, the former action can be pleaded as an estoppel.² And in a case where the plaintiff recovered a judgment on a bond, whereby the defendant was bound to the plaintiff to abstain from all injuries to the plaintiff's property, was held a bar to a subsequent action of tort by the same plaintiff against the same defendant, for particular injuries committed to the property, between the time of giving the bond and the beginning of the former action.³

SEC. 78. When, however, several causes of action are set forth in the complaint, the law presumes that the judgment covers the whole; but this presumption may be rebutted by clear proof that it extends to only one of the counts, or part of them. So, a presumption that a judgment obtained on a contract for the payment of money in installments, includes the whole amount of the debt, may be rebutted by parol evidence that a portion of the installments were not due, and that the action and judgment could not include them at the time of its rendition, and a judgment recovered for that portion which could not have been included in the former. A plea of former recovery in trover may be defeated by proving that the property for which the subsequent action is brought was not converted until after the first litigation was decided; in cases of this kind judgments could not have been rendered on demands which did not accrue prior to the rendition of the judgment in the former action; and, in a late decision in Massachusetts, it was held that a judgment in an action of tort, in the nature of an action of trespass *quare clausum*, was not conclusive in another action between the same parties, upon the same close, if there was nothing to show that the two trespasses were identical,⁴ and that a judgment in an action for the

¹ Pinney v. Barnes, 14 Conn. 420.

² State v. Morton, 18 Mo. 53.

³ Goodrich v. Gale, 97 Mass. 15.

⁴ Morse v. Marshall, 97 Mass. 519.

conversion of a tree was not conclusive evidence of the title in a suit to recover the premises on which the tree stood, although accompanied by proof that the only question litigated in the former suit was the question of title.¹

SEC. 79. It may be shown that matters which might have been litigated and included in a former judgment, were excluded from its operation by evidence that not only the particular cause of action embraced in the second action was withdrawn from the record, but that the evidence adduced upon the trial of the former action upon the demands submitted to the jury, related to a particular or specific demand entirely different from that upon which the subsequent action is founded. Thus on a general verdict on a complaint embracing a half a dozen counts, that the evidence was given on one count only, and that there was none on the other, as if an action was brought upon a note, and for goods sold and delivered, and for money loaned, it may be shown that the verdict was rendered on the note and that the other two counts were withdrawn; or that no testimony was adduced to sustain the other two counts; or that a judgment on the common counts for work and labor which is a *prima facie* conclusion that it includes all the work and labor performed by the plaintiff prior to the commencement of the action, yet in a subsequent action for work and labor it may be shown that it is different from that which formed the subject of the former action. So a judgment in an action for goods sold and delivered will not be available in another action of a like nature for goods sold prior to the commencement of the former action, though the plaintiff might have included it in his first suit.² But a judgment in favor of a vendor for the price of part only of the goods sold, is a bar to a subsequent suit for non-delivery.³

SEC. 80. A party cannot sustain a suit on a ground which would have constituted a sufficient defense to a former action

¹ Johnson v. Morse, 11 Allen, 540.

² Sweet v. Tuttle, 14 N. Y. 465; Wight v. Butler, 20 Johns. 367; Banker v. State, 6 Ind. 248; Phillips v. Berick, 16 Johns. 136; Brony v. King, 10 Mo. 57; Budd v. Gray, 14 Pick. 136.

³ Lawrence v. Hunt, 10 Wend. 80; Stevens v. Teft, 8 Gray, 419; Sawyer v. Woodbury, 7 Gray, 501; Eastman v. Cooper, 15; Cush. 276.

against him.¹ So, where a party has a defense which he neglects to make, he is estopped after the rendition of judgment from seeking relief in a court of equity. But where a defendant is ignorant of the facts which constitute his defense at law pending the suit, or the defense is not available at law, the case forms an exception to the rule, that equity will not interpose to relieve against a judgment at law; but if he be guilty of any negligence, courts of equity cannot interfere. So, a physician against whom judgment has been rendered for mal-practice cannot recover in action for professional services, in the course of which the mal-practice is alleged to have occurred, while a judgment for his services will be a bar to a subsequent action for mal-practice. In the case of *Gates v. Preston*, 41 N. Y., the plaintiff in the justice's court brought an action to recover six dollars for professional services; the defendant confessed judgment for the amount, and then brought an action in another court claiming damages for an alleged mal-practice occurring during the time for which the services were rendered on which judgment had been confessed; the court there held, that the judgment in the justice's court in favor of the surgeon for professional services was a bar to any action by the defendant against him for mal-practice in performing such services, where the judgment was rendered by confession, without a trial, and, although the suit was brought by the surgeon and judgment was rendered prior to bringing the action for mal-practice,² on the ground that the judgment in the former actions being presumptive if not conclusive proof that there is no cause of action or foundation for the subsequent suit. So, where one is induced to indorse a promissory note by the statements of the payee that it was a mere matter of form, and that he would not be troubled about it, and afterward suit is brought and he makes no defense, and judgment is rendered, he is estopped from claiming that the judgment is not binding upon him.

¹ *Mariot v. Hampton*, 7 Durn. & East, 265; *Le Queen v. Gouverneur*, 1 Johns. 496; *Embry v. Carver*, 3 N. Y. 522; *Voorhees v. Bank of U. S.* 10 Pet. 449.

² *Davis v. Talcott*, 12 N. Y. 184; *White v. Merrett*, 7 N. Y. 352; *Bellinger v. Carrique*, 31 Barb. 334; *Edwards v. Stewart*, 15 Barb. 66.

But where after the judgment, statements to a similar effect were made under such circumstances as to justify the indorser in believing and acting upon them, and in supposing he was not liable, and he was thereby induced to abstain from securing himself, when he might easily have done so, until the maker was insolvent, and an execution was then levied upon his property, it was held that he was not bound by the judgment and that he was entitled to a perpetual injunction.¹ So, a plaintiff who has declared specially on a contract will be entitled to rely on the judgment in his favor as conclusive that the contract was in force during the period over which the declaration extended. So, where a plaintiff had sued a defendant on the same contract of lease as that set forth in the declaration, and recovered judgment against him, was a good answer to a plea that the lease had been amended before the breach for which the former action was brought.² The rule that the estoppel of a judgment must be certain, and will not be extended by implication to matters not embraced its terms, does not hold good where the implication is irresistible, or so far aided by extrinsic evidence as to leave no room for doubt. A judgment is conclusive not only to the point which it professes to decide, but of matters which it was necessary to decide, and which were actually determined as to the ground work of the decision. So, where an order reciting that John and William were the lawful children of their parents, and that their last settlement was in the parish of Hartington, was held conclusive of the settlement of the parents as well as of the children, because the one was involved in the other, and appeared from the record, though not set forth in it, for the reason that it partook of the nature of a proceeding *in rem*.³ So, a judgment in favor of a servant, who is suing for wages, or a physician who has brought an action for his fees, is in form merely that the plaintiff is entitled to the compensation which he claims. But it also conclusively

¹ Roberts v. Miles, 12 Mich. 297; White v. Merrett, 7 N. Y. 352.

² Faust v. Ramsey, 7 Ohio State, 457; Gardner v. Buckbee, 3 Cowen, 124.

³ Davidson v. Shipman, 4 Ala. 27; Chamberlain v. Galhard, 26 Ala. 591; The Queen v. Hartington, 4 E. & B. 788.

establishes, that the plaintiff did all it was necessary for him to do in order to recover, and estops the defendant from denying that such was the case, or recovering damages for an alleged want of care or skill in the course of business in which the plaintiff was employed.¹ While an estoppel cannot be drawn from a judgment by arguing from it to anything that lies beyond, it is often necessary to reason back to the foundation on which it rests, on the principle that when a conclusion is indisputable and could only have been drawn from certain premises, the premises will be equally indisputable with the conclusion. A former judgment is conclusive not only of the thing directly decided, but of every fact which was essential to the adjudication. A judgment that a plaintiff is entitled to compensation for an alleged wrong, is not merely a judgment that so much is due, but it is also a judgment in favor of the right or title set forth by the plaintiff, and against that opposed to it, or relied upon by the defendant; and, although this may be in one sense a mere inference or presumption, still it is a necessary inference which cannot be controverted.

SEC. 81. Matter which would have been a defense to a former action cannot afterwards be made the subject of another suit. Where a party has an opportunity to set up fraud as a defense to a suit at law, but omits to do so, he cannot maintain a bill in chancery for the same fraud. The judgment of the court is not only final as to the matter actually determined, but as to every other matter which the parties neglect to litigate in the cause, and which might have been decided; but this is only limited to mere matters of defense. A judgment extinguishes the demand, and if a plaintiff bring two actions for the same cause; a judgment in one is a bar in the other, and is conclusive in any future litigation of the same question between the parties and those claiming under them, whether the question arises either directly or collaterally in such subsequent litigation, provided the question of estoppel is brought before the court in the proper form, and it makes no difference in this respect

¹ Gates v. Preston, 41 N. Y.

that the object of the first suit was different from the second. A demand which has been passed upon as a set-off, or by way of defalcation or recoupment, cannot be made the subject of any other cause of action. So a vendee who elects to set up fraud or breach of warranty in mitigation of damages, or as a bar to an action for the purchase money, will be concluded by the judgment, and is estopped from afterwards bringing an action, on the defense that he pleaded in the former suit.

SEC. 82. An estoppel created by a judgment is not limited to facts admitted or proved. Judgments turning exclusively upon questions of law are equally conclusive. It is the judgment itself, whatever may be its form and without any regard to the nature of the question in controversy, that creates the estoppel, and when the same question is at issue between the parties in two successive actions, a judgment rendered for the defendant in the first is an absolute bar to a recovery in the second, although the evidence in the second, had it been given in the first, would have entitled the plaintiff to recover,¹ and although the subject-matter of a subsequent suit is different from the first, when it depends upon the same question it is equally conclusive. Thus, where A. gave B. a bill of sale of property, C. a constable levied an execution against A. upon the property, but did not remove it; A. subsequently converted it to his own use, for which conversion C. sued him and obtained judgment that the sale was fraudulent and void as to the creditors of A. Held, in a subsequent replevin by B. against C. that the former judgment was conclusive upon the question of fraud in the bill of sale.² And where a plaintiff brought an action against a sheriff for taking certain personal property, which on final hearing was determined against the plaintiff, after the sheriff had sold the property, the plaintiff brought an action to recover the same of the purchaser at the sheriff's sale, and it was held that the judgment in the suit

¹ *Buchead v. Brown*, 5 Sandford, 134; *Miller v. Manice*, 6 Hill, 14.

² *Doty v. Brown*, 4 N. Y. 71; *White v. Coatsworth*, 6 N. Y. 137; *Castle v. Noyes*, 14 N. Y. 329.

against the sheriff was a bar to the action against the purchaser.¹

SEC. 83. It is not necessary to the conclusiveness of the former judgment that the issue should have been taken upon the precise point controverted in the second trial ; it is sufficient if it was essential to the finding of the former verdict. Thus, where the parish of Islington was indicted and convicted for not repairing a certain highway, and afterwards the parish of St. Pancras was indicted for not repairing the same highway, on the ground that the line dividing the two parishes ran along the middle of the road, it was held that the former record was admissible and conclusive evidence for the defendants in the latter case to show that the road was wholly in Islington ; for the jury must have found that it was so, in order to find a verdict against the defendants.

SEC. 84. The estoppel of a judgment extends beyond what appears on its face ; it includes every allegation made by the plaintiff and denied by the defendant ; it extends to every fact in issue between the parties, that was adjudicated in the action ; and while it not only proves and establishes the case of the successful party, it denies and refutes that of the other ; and on this principle a judgment in one action on a mortgage conclusively establishes the debt for which it is given is justly due. So, a judgment for the plaintiff on a contract is conclusive, not only that the plaintiff shall recover the amount awarded by the jury as damages or compensation, but that he has done every act and performed all the stipulations that were conditions precedent to the right to maintain the action ; and the defendant is estopped from afterwards alleging that the plaintiff has failed to do what the judgment has formally declared he has done.² So, a master who fails in an action, for negligence, against his servant, cannot, in a subsequent action by the servant for wages, avail himself of the negligence as a defense to the action, the former judgment having disposed of that question. A judgment against two or more

¹ *Prentiss v. Holbrook*, 2 Mich. 372.

² *Davis v. Talcott*, 12 N.Y. 184.

defendants jointly is an entirety, and neither party can take any advantage of it without affecting all ; it cannot be void in part and good in part ; it must be either entirely void or not at all, and if reversed as to one, must be as to all.¹ Where a motion to set aside a verdict is overruled, and judgment is entered on the verdict, a similar motion in the same suit, between the same parties or their privies in estate, to set aside a verdict settling the same question in the same way, cannot be heard. The judgment is conclusive on the parties and their privies in estate, the matter in litigation having passed *in rem judicatum* is finally settled, and is conclusive when arising in a subsequent proceeding, though before a different tribunal. But where points come collaterally or incidentally under consideration, or can only be argumentatively inferred from the decree, the rule does not apply ; and where a bill is filed in a U. S. court during the pendency of a suit in another action, in a State court, against both the parties to the bill, to enforce a claim to the same premises, it was held, that as the parties, the objects and the equities were different, and the relief prayed for involved a different decree, the suit in the State court constituted no bar to the bill.

SEC. 85. A decree of the United States Court giving a discharge in Bankruptcy, under the act of Congress establishing a uniform system of bankruptcy throughout the United States, is conclusive, unless the certificate has been impeached for fraud, or the debt is one of the fiduciary class, which is saved from the operation of the act. So, a decree showing an absolute discharge, that the bankrupt was authorized to receive it, is as conclusive as the certificate itself. So, a verdict and judgment for the defendant in an action on a contract, on the plea that he had been discharged as an insolvent debtor, will estop the plaintiff from disputing the discharge in an action on a contract between the same parties.² So, where a license is pleaded in an action brought for the erection of a nuisance, and found for

¹ Buffin v. Ramsdell, 55 Maine, 252; Page v. Esty, 54 Maine, 319.

² Merriam v. Whittemore, 5 Gray, 316.

the plaintiff, the defendant is estopped from setting up the same defense in a subsequent suit for the continuance of the nuisance, and the only question for the jury is whether the state of things remain the same or not.¹

SEC. 86. The rule that estoppels must be certain to every intent, is peculiarly applicable to estoppels by record and judicial proceedings, and for this reason the record of a judgment must show with some degree of certainty the precise points determined, and not from inference or argument; and where it gives no indications at all of what particular matters were adjudicated, it leaves the question unsettled, and is not available either as an estoppel or anything else, but merely evidence of its own existence. The conclusive effect of a judicial decision cannot be extended by argument or implication to matters which were not determined.² Evidence *aliunde* to explain a record is therefore admissible, and often becomes a necessity. Whether any matters have been tried between the same parties is a fact depending partly on parol testimony and partly on the record. Thus, a judgment for the plaintiff on a petition containing several counts, is not conclusive of the existence or validity of the contract set forth in the special count.³ In a case,⁴ in 5th Wallace, Justice NELSON in delivering the opinion of the court said: "The court, when the case came up on error, agreed that the record was properly admitted as evidence of the former trial between the parties, but held that the pleadings, verdict and judgment did not furnish the necessary proof, to show that the contract in controversy in the suit then on trial had been before agitated, and conclusively adjudicated in the former trial on behalf of the plaintiffs; that the verdict had been rendered upon the entire declaration, and without special reference to the first count." The record, with the pleadings and verdict, furnished evidence that the same matters might have been litigated on that

¹ Kilheffer v. Herr, 17 S. & R.

² Chamberlain v. Gaylord, 26 Ala. 504; Mallet v. Foxcraft, 1 Story, 474; Imhsen v. Ormley, 32 Penn. St. 198.

³ W. Steam P. Co. v. Sickles, 24 How. 533.

⁴ W. S. P. Co. v. Sickles, 5 Wallace, 592

trial, and afforded ground for the introduction of extrinsic evidence to show that the same contract had been in contest before the court, and had been referred to the jury, but nothing more. For this reason the judgment was reversed and a new trial ordered. Taking this view of the application and effect of the record of the former trial, the plaintiffs introduced extrinsic evidence, and have endeavored to prove the necessary facts which, in connection with the record, would lead to the conclusion that the same contract was in controversy in the former suit, and had been conclusively adjudged in their favor. But this extrinsic evidence was open to be controverted on the part of the defendants, as the record itself did not furnish evidence of the finding of the existence or validity of the contract in the former suit, and hence extrinsic proof was required; to this effect it was of course competent for the defendants to deny and disprove both, as in so doing they did not impeach the record, but only sought to disprove the evidence introduced by the plaintiffs. The declaration in the former suit contained four counts, to which the general issue was pleaded, and a general verdict for the plaintiffs. The first and fourth counts set up two different special contracts relating to the same subject-matter, and which constituted the cause of action between the parties. Now, the extrinsic evidence furnished on the part of the plaintiffs as to the former trial and the grounds of proceeding therein, tended to prove either count, and was sufficient to have justified the jury in finding either contract. These contracts as thus set forth were identical, with the exception of the agreement to settle the proportion of fuel saved by an experiment. The jury, therefore, might have found in favor of the plaintiffs on the contract as set forth in the fourth count, even if they disbelieved the proof of the agreement as to the mode of settling the proportion of fuel saved. As we understand the rule in respect to the conclusiveness of the verdict and judgment in a former trial between the same parties; when the judgment is used in pleading as a technical estoppel, or is relied on by way of evidence as conclusive *per se*, it must appear by the record of the prior suit that the particular

controversy sought to be concluded was necessarily tried and determined—that is, if the record of the former trial shows that the verdict could not have been rendered without deciding the particular matter, it will be considered as having settled that matter as to all future actions between the parties; and further, in cases where the record does not show that the matter was necessarily and directly found by the jury, evidence *aliunde* consistent with the record, may be received to prove the fact; but even where it appears from extrinsic evidence that the matter was properly within the issue controverted in the former suit, if it be not shown that the verdict and judgment necessarily involved its consideration and determination, it will not be concluded.¹ The evidence should be confined to the points in controversy on the former trial, to the testimony given by the parties, and to the questions submitted to the jury for their consideration, and then the record furnishes the only proper proof of the verdict.²

SEC. 87. A verdict and judgment for the defendant in trover or trespass *de bonis as portates*, cannot be pleaded as an estoppel in a subsequent action for the same goods, with the aid of proper allegations, for the reason that the jury may have been of the opinion that the defendant did not take the goods, not that they did not belong to the plaintiff.³ So in an action for replevin, where a plaintiff took several chattels from the possession of the defendant, and recovered final judgment for part of them only, on a trial in which the whole was contested. In a subsequent action of replevin brought to regain possession of the residue of the chattels by him from whose possession they had been so taken, he cannot be permitted to allege title and prove it by the same evidence by which he endeavored to prove title to the same property on a former trial and failed. The effect of a ver-

¹ Wood v. Jackson, 8 Wend. 10; W. Steam P. Co. v. Sickles, 24 Howard, 333; Lawrence v. Hunt, 10 Wend. 80.

² Wood v. Jackson, 8 Wend.; Hitchin v. Campbell, 2 Blackstone, 827; Saunderson Pleading and Ev. Pt. 1, 260; 5 Wallace, 592.

³ Bennett v. Holmes, 1 Dev. & Bat. 486; Long v. Bangas, 2 Ired. 290; Angel v. Hollister, 38 N. Y. 378; Gates v. Fassett, 5 Denio. 21.

dict, where the answer put in issue the allegations of the complaint, is not necessarily conclusive that the plaintiff has no title to the property, for the reason that it may have been found that the plaintiff did not wrongfully detain. Its effect therefore depends upon extrinsic evidence ; but where the property was taken from the defendant's possession, and, it is proved that the title was in fact in question, and the subject of the contest on the former trial, the verdict therein is conclusive. A verdict and judgment are conclusive by way of estoppel only as to facts, without the existence and proof or admission of which they could not have been rendered.¹ In order that a judgment shall be conclusive it must appear by record, or by some sufficient means of proof, that the title was actually drawn in controversy and decided.² Justice MILLER, in the case of *Washington, &c., Steam Packet Co. v. Sickles*, 5 Wallace, in his dissenting opinion says, that it was decided in the same case in 24 Howard, that between parties and privies it is not necessary that the record should show the question upon which the right of the plaintiff to recover depended, for it to operate conclusively, but only that the same matter in controversy might have been litigated, and that extrinsic evidence would be admitted to prove that the particular question was material and was in fact contested, and that it was referred to the decision of the jury. The rule as I understand it, is that to render such former judgment conclusive, it is only necessary to show that the same matter might have been decided and actually was decided ;³ but the rule seems to be that while it is not conclusive, but *prima facie* evidence, the onus is on the party against whom the record is used to prove to the contrary.

SEC. 88. A judgment dismissing a complaint on the ground that a material element of the cause of action was wanting, is a bar to another action. Thus, in an action on a recognizance, a judgment finding that the recognizance was never filed, and that the recognizance was necessary to sustain an action thereon, is a bar ; for it shows that the

¹ *Brulen v. Shannon*, 99 Mass. 200 ;
Lea v. Lea, 99 Mass. 493.

² *Parker v. Hotchkiss*, 2 Conn. 326.
³ *Keene v. Clark*, 5 Robertson, 38.

merits of the controversy were litigated, submitted and decided. To sustain a recovery in another action, it would be necessary to find that the conclusions of the former judgment were not true in point of fact, and this it is not competent to do as long as the former judgment is unreversed and remains in full force and effect.¹ The recovery of a judgment by an assignee of a cause of action is conclusive on the question whether the cause of action was assignable.² So, a recovery upon a partnership contract merges the debt, and a judgment against one partner constitutes an estoppel in a subsequent action for the same breach against his co-partners.³ And in order to render a decree or judgment conclusive against a party, it need not be against him by name; it is enough if it be against his interest.⁴ Where a *cestui que trust* consents that part of the trust property may be exchanged for other property by the trustee, and upon a bill filed by the trustee, the exchange is passed upon by a special jury and the chancellor, and ratified by a decree, the *cestui que trust* is estopped.⁵ This principle of conclusiveness is inflexible, and will not yield to circumstances or the hardship attendant upon its application in the particular instance. A judgment for the defendant on plea of *nul tiel record* to an action of debt on a judgment, is conclusive even where the failure of the plaintiff arises from having the judgment defectively authenticated or certified, and the validity of the judgment is beyond dispute;⁶ nor can the conclusiveness of a former judgment be overthrown by proof that it was procured by fraud or the subornation of witnesses,⁷ or that the cause of action originated in a fraud that was not discovered until after the rendition of the judgment. The only relief a party can obtain is in equity, under circumstances similar to those hitherto mentioned; and as this principle of conclusiveness effects privies, as well as parties, a

¹ People v. Smith, 51 Barb. 360.

⁵ Carr et al. v. Armory College, 32

² Richtmeyer v. Remsen, 38 N. Y. 206.

Georgia, 557.

⁶ Voltz v. Proutz, 15 Ill. 434.

³ Tinkum v. O'Neal, 5 Nevada, 93.

⁷ Demerest v. Lyford, 7 Foster N.H.

⁴ Taylor v. Cornelius, 60 Penn. St. 187.

541; R. R. Co. v. Sparhawk, 1 Allen 448; Smith v. Lewis, 8 Johns. 137.

vendee cannot set up a defense in a suit upon a mortgage which has been previously decided against the vendor, or where a point which has been decided on the merits, in a suit at law, is again brought into question on the same grounds in equity.¹ Thus, a vendee, who had covenanted to convey other land, as soon as certain incumbrances on the land conveyed to him were removed by the vendor, is estopped from pleading a failure to remove them, as a bar to the covenant, by a prior decree in equity directing that the incumbrances should be discharged by him out of the purchase money due to the vendor, with the same effect as if they had been paid by the latter;² but it applies only where both jurisdictions are concurrent; and a judgment at law will not estop the defendant from seeking relief on equitable grounds in chancery,³ or the dismissal of a bill, for want of jurisdiction in chancery, cut the plaintiff off from obtaining redress at a suit of law.⁴

SEC. 89. The effect of verdicts and judgments, whether upon parties or privies, depends upon the question whether the same point was in issue. A verdict between two parties on one question can certainly have no binding effect in an issue joined between them on another question, nor will the judgment be admissible unless it clearly appears that the same point was actually in issue and was determined in the former action. Thus, an action for a deliberate and intentional fraud practised by a person in making a sale, may be maintained against him personally, even though he acted as agent of another in making the sale; and it makes no difference that the plaintiff has already sued the seller for a breach of warranty and has been defeated in such action. Had he recovered in the first action and got his damages, he might be estopped, but where he fails by reason of having no cause of action on the warranty, he may still have a good cause of action for the fraud, which has never been determined. So, where one contract contains several covenants, an action for breach of one is not necessarily a

¹ Kingsland v. Spalding, 3 Barb. Ch. 141; Simpson v. Hart, 1 Johns. 96; Hemstead v. Conway, 1 English, 311.

² Hopkins v. Lee, 6 Wheat. 109.

³ Arnold v. Greene, 2 Clarke, 1.

⁴ Lore v. Newman, 10 Ohio S. 45

bar to a subsequent action for breach of another, although the two relate in part to the same subject-matter, as in covenants to build a fence, and also to keep the buildings and fence in repair. In order to preclude a second action for items which might have been embraced in the first, the true question is not, whether allowing separate actions to be maintained for separate items would lead to a multiplicity of suits or would operate oppressively, but whether the former action was for the identical cause or demand for which the subsequent one was brought. One method of ascertaining whether the subject-matter or cause of action is the same as in a former suit is, to inquire whether the same evidence would sustain both actions, and, although the former action is changed, if the same matter is determined, the former judgment is admissible in evidence upon the subsequent trial. A judgment for the defendant in trespass, when the right of property is determined, will be effectual as an estoppel in an action of trover for the same taking. So, a judgment for the defendant in trover is a bar in an action for money had and received for the wrong arising from the sale of the same goods; and thus, though the former action was against the creditor and sheriff, and the latter against the creditor alone. Where a court, in a former action between the same parties, had jurisdiction over the subject and the parties, and the questions of fact are the same as in the subsequent action, and were necessary to its decision, and either was or might have been litigated in that suit, and the final hearing was upon its merits, the judgment is *res adjudicata* as to all those things that were, or under the pleadings might have been, controverted in that action. Where proceedings in partition are properly taken to bind unknown owners, the judgment not only concludes them in respect to any interest they may have as tenants, but precludes them from showing afterwards that they had a paramount title in severalty to any part of the premises.¹ A decree in partition cannot be inquired into in a collateral suit to see whether irregularities exist in the proceedings.

¹ Kane v. Rock River Co. 15 Wis. 179.

But in Illinois, if the decree in partition recites that due notice was given, it is only *prima facie*, not conclusive evidence of the fact.¹ A decision of a United States district court enjoining a treasury warrant is final, and bars an action on the account which formed the subject-matter of the warrant and bill of complaint.² And where a court has jurisdiction of the parties, and a judgment is entered by consent of parties, the parties, and those claiming under them, are estopped from denying that they consented in the absence of an allegation of fraud. So a party cannot deny that a judgment was rendered on the day of its entry; if the record is regular on its face, it is conclusive, as it imports absolute verity.³ In order to make a judgment effectual as an estoppel, it must appear that the facts were actually passed upon by the jury in the former case, and, if the pleadings do not show it, and no evidence is introduced, the record is only evidence of what is necessarily put in issue by the pleadings.⁴

SEC. 90. It is not necessary in a partition suit, in order that a judgment shall bind the parties on a question of intestacy of an ancestor, or the validity of his will, that the adjudication of those matters should be in precise terms. It is sufficient if the substance is decided. The estoppel extends beyond what appears on the face of the judgment to every allegation, which, having been made on one side and denied on the other, was at issue, and determined in the course of the proceedings. Those who rely upon the estoppel must, of course, show that the matter in controversy has already been heard and determined; but where it is made to appear with sufficient clearness that the transaction has undergone a judicial investigation, the presumption will be irresistible that the judgment covered the whole, so far as it was entire and indivisible, and cannot be overcome, except by the clearest proof that no evidence was given as to that fact by the plaintiff, or that the defendant

¹ *Secrist v. Green*, 3 Wallace, 744.

² *U. S. v. Nourse*, 9 Peters 8.

³ *Ridgway v. Morrison*, 28 Ind. 201; *Ray v. McMurty*, 20 id. 307.

⁴ *Sherman v. Dilley*, 3 Nevada, 21.

failed to take advantage of a defense that might have been made available.¹ Judgments are not merely final as to the facts actually litigated or decided, but they are usually (except where proceedings are instituted in the same cause of action for their reversal) conclusive evidence of their own rectitude and virtue; and it is upon this principle that no action will lie for obtaining a decree of judgment by false evidence.² The case of *Marriott v. Hampton* (7 Durn. & East, 265), heretofore referred to, is a forcible illustration of this principle. The general principle that a judgment of a court of dernier resort is final, admits of no doubt; but the principle extends still further, as to include everything that might be litigated or decided. The reason for the rule seems to be, that it is both expedient and proper to silence the contention of parties by accomplishing the ends of justice by a single and speedy decision of all their rights. It is, therefore, obvious that there should be some time prescribed to controversies of this sort, and can there be a more fitting and proper opportunity than one which affords a full and fair opportunity to examine and decide all their claims? This rule certainly imposes no hardship. It does not require anything more than a reasonable degree of vigilance and attention; a different course would be dangerous and oppressive. It would create infinite litigation and vexation, render judgments and final determinations of the rights of parties a useless expense, resulting in no benefit, but, on the contrary, resulting in a series of harassing operations, which, under the guise of justice, would never render justice. "Every one is bound to take care of his own rights, and to vindicate them in due season and in proper order." This is a sound and salutary principle of law. Accordingly, if a defendant, having the means of defense in his power, neglects to use them, and suffers a recovery to be had against him by a competent tribunal, he is forever precluded. The only case forming an exception to this rule is the case of mutual dealings between the parties, where

¹ *Clemens v. Clemens*, 37 N. Y. 59.

² *Peck v. Woodridge*, 3 Day (Conn.) 30; *Smith v. Lewis*, 3 Johns. R. 157; *Homer v. Fish*, 1 Pick. 435.

the defendant omits to set off his counter-demand, and may still recover in a cross-action and ejectment, where the defendant purchases title after judgment is rendered against him. The general rule is intended to prevent litigation and to maintain peace; were it otherwise, men would never know when they might repose with security on the decisions of courts of justice, and judgments solemnly and deliberately rendered would cease to be revered as being no longer the end of controversy and the evidence of right,¹ whose adjudication were necessary to the final disposition of the case. A judgment for the defendant in trespass, for taking a chattel, is an estoppel in an action for the money received from its subsequent sale, for the reason that both actions relate to the same subject-matter, and must be determined substantially upon the same evidence.² And where a plaintiff, in an action of ejectment on a mortgage, had previously recovered judgment on a note given by the defendant for the debt, for which the mortgage was security, the defendant in the ejectment suit was not allowed to plead the same defense which he had unsuccessfully used in the action on the note.³ A failure in an action brought to recover damages for the non-delivery of lumber, was conclusive against the plaintiffs, denying the non-delivery in action, on a bond given for the price.⁴ The limited nature of a judgment for damages only, does not prevent its operation as an estoppel as to all the questions embraced in the pleadings; and as the non-delivery of the lumber must have been the material point in issue, in order to found a verdict for the assessment of damages, it is obvious that the judgment must be conclusive in action for the price of the lumber.

SEC. 91. A judgment *in personam* recovered without notice, or attachment of property, on *mesne* process is void. In a collateral proceeding, a judgment against one who had no opportunity to defend, may be avoided by proof of

¹ Le Quen v. Gouverneur, 1 Johns. 501.

² Lewis v. Nenzell, 38 Penn. 222.

³ Betts v. Starr, 5 Conn. 350; Goddard v. M. Bank, 4 N. Y. 174; Cist v. Ziegler, 16 S. & R. 282; Sheldon v. Carpenter, 4 N. Y. 578; Etheridge v. Osburn, 12 Wend. 399.

⁴ White v. Reynolds, 3 Penn. 97; Casler v. Shipman, 35 N. Y. 533.

fraud, or shown to be void upon its face ; a judgment of nonsuit is not a bar to another action. Nor an agreement to submit a case upon an agreed statement of facts upon which judgment and nonsuit was entered by the court.¹ But where the facts put in issue by an assignment of a breach of a sheriff's bond have been once tried in a statutory proceeding, they cannot again be drawn into question, and it is a question of law, on inspection of the record, whether they were or were not in issue in the former proceedings. So a decree, that a vested interest in remainder is not subject to the claims of creditors, though erroneous, is *res adjudicata*; and is conclusive against the rights of creditors, when the estate comes into possession of the remainderman by the death of the tenant for life.² No recovery can be had on a cause of action which has been pleaded or offered in evidence as a defense in a former action, in which it was legally admissible, although the court may have erred in excluding it from the jury. The estoppel of an adjudication, made on grounds purely technical, and under such circumstances that the merits could not come in question, will be limited to the point actually decided. A judgment is conclusive on all points within the scope of the record and legally brought before the court and jury, although extrinsic evidence may be given for the purpose of showing what the controversy really was, and showing that matters expressly or impliedly embraced in the pleadings, and which might have been adjudicated, were not presented or decided in fact. But while parol evidence may sometimes be admitted for the purpose of limiting the estoppel, it is never allowed to enlarge its operation, or to show that matters foreign to the record were embraced in the verdict. The mistakes of a judge who tried the cause cannot serve as a reason why matters *prima facie* within the bar of the judgment should be excluded from it, for the reason that the remedy is by a new trial or writ of error.

¹Homer v. Brown, 16 Howard, 354; Foy v. Almy, 1 Woodbury and Minot, 263.

²Nichols v. Levy, 5 Wall. 433.

SEC. 92. But in order to give a judgment this conclusive effect, it must have been made by a court of competent jurisdiction, upon the same subject-matter between the same parties, and for the same purpose, and such a judgment between the same parties, upon the same point, is conclusive as a plea in bar, or when given in evidence ; and it makes no difference whether other parties are estopped by it or not, and it is so far conclusive, although all the parties in interest may not have been before the court, that its validity cannot be collaterally questioned in another tribunal, and when it is used as evidence its regularity cannot be enquired into. Thus, in a case of a sale of mortgaged premises under a decree in equity, the regularity of the sale cannot be called into question in a collateral suit ; and so conclusive is their effect that even the courts rendering them are estopped from annulling their final decrees or judgments, either for error of fact or law ; after the term at which they are rendered, unless it be for a clerical error, or to reinstate a cause dismissed by mistake, and a final decree in chancery is as conclusive as a judgment at law. But a judgment for a defendant on the plea of the statute of limitations, is not necessarily a bar to another action on the same contract in another state.¹

SEC. 93. There are many reasons why the plea of *res adjudicata* should be more cautiously received under the Code system of pleadings, than is or was necessary under the common law system of pleading. The want of certainty in the system of pleading under the Code, renders it not unfrequently difficult, if not impossible, to determine what issues have been joined, and the precise rights which have been adjudicated. The united law and equity jurisdiction enables parties litigant to embrace in the same suit more than one cause of action or defense, which would be incongruous and inadmissible under a different system, and perhaps the widest range known to any system tolerated in the form and scope of code pleadings. Parties who have several causes or rights of action against the same party, of different and

¹Wright v. Bodley, 14 Peters, 156; Bank of U. S. v. Donnelly, 8 Peters, 361.

distinct character, are not compelled to unite them in the same suit, on penalty of being barred as to those not included ; nor, is this the meaning of that well settled principle, that a judgment or decree of a court of competent jurisdiction is final and conclusive, not only as to every matter determined, but also as to every other matter which the parties might litigate in the cause, and which they might have had decided ; nor does the rule apply so as to defeat a trial upon the merits because of a former suit between the same parties, upon the same subject-matter, where no adjudication upon the merits is sought or prayed for by either party, in which a judgment upon a general exception was rendered, merely dissolving an injunction which had been previously awarded against a third party having no interest in the suit, and awarding costs, &c. The Code system of pleading does not by any means favor a multiplicity of suits, and when the proper parties are brought before them, the courts will hear and finally determine all of the rights of the parties touching the subject-matter, if properly presented, whether such was the original intention of the parties or not; but, if neither party demands a judgment upon the merits of the respective rights claimed, and the judgment of the court appears to have been rendered upon the merits of a mere preliminary question, it would be rendering harsh injustice, and make justice and equity a species of tyranny utterly antagonistic to the signification of those terms.

SEC. 94. It is an admitted principle, that a demurrer admits all the facts well pleaded, and demands the judgment of the law upon those facts; and when the judgment is pronounced it must be conclusive upon the parties, and as effectually determine the litigation as if judgment had been rendered on a verdict. But there is this difference to be observed between judgments on verdicts and judgments on demurrer ; the former are certain as to what was intended to be decided, however inartificially drawn, whereas the latter are often of very doubtful construction, leaving it difficult to determine whether the judgment was intended to sustain the demurrer, as to all matter demurred to or only partially. In a judgment on demurrer, if the reason to be

collected from the record appears to have been matter of form, it cannot be pleaded in bar;¹ when a judgment that is rendered on demurrer and the parties are still left in court, it must be obvious that such a judgment cannot be available as an estoppel, nor preclude a trial on the merits.

SEC. 95. The conclusive effect of a judicial decision cannot be extended by argument, inference or implication to matters which were not actually heard or determined. In the case of *Meserau v. Pearsal*,² the matter in controversy was whether the defendant had obstructed the working of a mill by building and raising a dam; the court held that he could not escape from the estoppel of a former judgment in regard to the same mill, on the ground that he had obtained a verdict and judgment in another action brought by the plaintiff for an injury alleged to have been occasioned to another mill for the same cause; evidence was adduced that the mills were both on the same level, and that one could not have been injured or interfered by the water backing on it unless the other was likewise injured, for the reason that such an inference might be probable or certain; still while there was no inconsistency in the verdicts, they were each conclusive in its own sphere. The celebrated case of the *Duchess of Kingston* is probably as familiar to every practitioner who has ever had an action in which the question of estoppel arose, as *Blackstone* or *Kent's* commentaries; in fact, it is the leading case on the question of estoppels by record, and from it, has been deduced the well-settled and universal principle that a judgment is not evidence of any matter which came collaterally in question, nor of any matter incidentally cognizable, nor of any matter to be inferred by argument from the judgment; and I have been unable to find any exceptions to the rule. Collateral or incidental questions which must naturally arise in and during the litigation of every controversy do not become a part of the action by being given in evidence, or because they are brought to the notice of the court; while on the contrary, matters that are and might be well pleaded, and if they

¹ 1 *Blackford*, 392.

² 19 *N. Y.* 108.

were, would constitute a good plea, are neither incidental or collateral, and constitute an essential part of the cause of action or defense ; and it is on this ground, that a judgment is conclusive not only of the right which it affirms or denies, but of all the questions which were material and necessary to be determined during the pendency of the litigation. A recovery in an action of tort, *without satisfaction*, does not invest the defendant with the title to the property, and consequently is no estoppel in a subsequent action of the same kind against one who claims under him.¹

Thus, in trespass or for torts generally, nothing is conclusively settled but the point or points directly in issue. Thus in trespass, upon not guilty pleaded, the title is not concluded, though if the title is put in issue by a plea of soil or freehold, the verdict will be conclusive on the title in another action of trespass for an injury done to the same land. So, in actions on the case for interruptions of rights and other easements. On the general issue the title is not settled, though if the defendant plead a title in bar, and issue is taken on it, the verdict will settle that point for future actions.² When a judgment is used in pleading as a technical estoppel, or relied upon by way of evidence as something conclusive, *per se*, between the parties, it must appear by the record of the prior suit that the particular controversy so sought to be precluded was there necessarily tried and determined. If in such cases the record shows that such judgment could not have been rendered without deciding a particular matter, it will be considered as having determined that particular matter in all future litigations, otherwise not. A judgment for the plaintiff in *assumpsit* expressly determines that the defendant owes the plaintiff a sum certain which the latter is entitled to recover by execution. But, in an action on a note, if a judgment is rendered against the defendant on a plea of *non est factum*, the judg-

¹Spivey v. Morris, 18 Ala. 254; Smith v. Alexander, 4 Sneed. 482; Drake v. Mitchell, 3 E. 251; Curtis v. Groat, 6 John. 168; Osterhout v. Roberts, 8 Cowen 43; Sanderson v. Caldwell, 3 Aik. 203; Jones v. McNeil, 2 Bar. 466.

²Standish v. Parker, 2 Pick. 20; Smith v. Sherwood, 4 Conn. 276; Church v. Leavenworth, 4 Day, 274; Richmond v. Hays, 2d Penn. 492.

ment in effect is not merely that the plaintiff shall recover the amount found due by the judgment, but that the defendant made the note. If the execution of a deed in fee be put in issue in an action of trespass, and expressly found by the jury, the verdict and judgment may be relied upon as conclusive evidence of that fact in the trial of a real action or writ of right between the same parties, for the same estate. It becomes a fixed fact between the parties, for all purposes.¹

SEC. 96. Lord Ellenborough, in rendering the decision of the court in the celebrated case of *Outram v. Morewood*,² after reviewing and citing numerous authorities, said, "that a verdict for the plaintiff in trespass is conclusive against the right of the defendant to rely on the same defense in a subsequent suit; it is not the *recovery*, but the *matter alleged* by the party on which *the recovery proceeds*, that creates the estoppel; and that the recovery of damages in one action was not only a bar to another recovery for the same injury, but that the estoppel went further, and established the right on which the recovery was founded." In the case of *Gardner v. Buckbee*,³ two notes had been given for the sale of one vessel; on one of the notes suit was brought in the Marine Court in the city of New York, where the defendant pleaded the general issue, and gave notice of a total failure of consideration, because of fraud in the sale of the vessel, and on that ground succeeded in his defense. In a subsequent action on the other note, the defendant offered in evidence the record of the former action, and the Supreme Court held that the record, with proof *aliunde*, that the fraud in the transaction was the ground on which the judgment had been rendered, and was conclusive against the plaintiff. In delivering the opinion of the court, WOODWORTH, J., citing the *Duchess of Kingston's* case, said, "that the rule there laid down had not been departed from in any of the courts of that State; that from the record of the former suit, it cannot be inferred

¹ *Sawyer v. Woodbury*, 7 Gray, 499.

² 3 East. 125.

³ 3 Cowen N. Y. 120.

whether the two suits were founded on the same or a different state of facts. It is true that the record merely proves the pleadings, and that the judgment was rendered for the defendant; without other proof, it would not make out a defense. The record shows that it was competent on the trial to establish the fraud of the plaintiff; whether the fraud was made out, and whether that was the point upon which the decision was founded, must necessarily be proved by evidence extrinsic the record; to do so, is not inconsistent with the record, nor does it impugn its verity. The jury must have passed upon the fraud; it was directly in question. Scott testified that the unseaworthiness was not disclosed at the time of the sale to the defendant. The inquiry was then solely directed to the question, Was the vessel unseaworthy, and had the plaintiff knowledge of that fact when he sold? By the finding of the jury, both propositions are affirmed. The judgment became conclusive between the parties on these points, and is an effectual bar to an action to recover the residue of the purchase money."

SEC. 97. The estoppel of a former adjudication will, however, only extend as far as the subject-matter, in the second action, is substantially the same as the first, and may be conclusive on some points, while leaving others open to controversy.¹ Hence, a verdict and judgment for the defendant, on the general issue, pleaded in which the plaintiff claimed damages resulting from the defendant's wrongfully raising his mill dam, will not estop the same plaintiff in another action for damages from alleging the same act as the occasion of his sustaining subsequent damages, because the former judgments may have been rendered on the ground that the plaintiff was not damaged, or had released his cause of action, or had given the defendant the right to do the act complained of, and did not necessarily determine the defendant's right to raise his dam, and continue it in that state.² So, a verdict for the plaintiff in an action *quare clausum fregit*, will estop the defendant from al-

¹ Nickerson v. California, 10 Cal. 520.

² Shafer v. Stonebraker, 4 Gill & S. 345; Killheffer v. Herr, 17 S. & R. 319; Shepherd v. Wallace, 19 Ohio, 322; Grant v. Ramsay, 7 Ohio St. 159.

leging the same title in a subsequent action of ejectment ; but if the defendant, after the rendition of the judgment, acquires title by purchase, he is not estopped from alleging that fact.

SEC. 98. In order that a judgment in one action shall be conclusive in another, it must appear with convenient certainty that the question in controversy in the second suit was litigated and decided in the first ; when this appears on the face of the proceedings in the former action, the mere production of the record will be enough ; but where, as often happens, it is not, it must be shown *aliunde* by parol evidence, and the burden of proof rests on the party who maintains the affirmative.¹ Although a different opinion has been expressed in other instances, and the presumption said to be, that a debt or demand which might have been given in evidence, under the pleadings in a former action, was actually laid before the jury.² "When," said ABBOT, C. J., in *Bagot v. Williams*, "the declaration in the second action is framed in such a manner that the causes of action may be the same as those in the first suit, it is incumbent on the party who brings the second action to show that they are not the same." The question is one which hardly admits of any general rule, but would seem to depend on whether the cause of action in the second suit is *prima facie* the same as that on which judgment was had in the first ; for when it is not, their identity cannot be presumed in the absence of proof.³ And hence, a recovery on the money counts, and for goods sold and delivered, will not bar a subsequent suit on a promissory note, merely because the note might have been given for the price of the goods, nor without sufficient evidence that it was.⁴ The question whether the same matters could have been litigated in both actions, must be determined solely by the record ;⁵ but if it shows that

¹ *Shotlister v. Butler*, 17 Ala. 733 ; *Doty v. Brown*, 4 N. Y. 71 ; *Davis v. Scott*, 14 Barb. 511 ; *Smalley v. Eddy*, 19 Ill. 207.

² *Badger v. Titcomb*, 15 Pick. 409 ; *Baggott v. Williams*, 3 B. & C. 235.

³ *Hughes v. Alexander*, 3 Duer, 488 ; *Secor v. Sturges*, 16 N. Y. 548.

⁴ *Cummings v. Colgrove*, 25 Penn. 50.

⁵ *Campbell v. Butts*, 3 N. Y. 173 ; *Young v. Black*, 7 Cranch. 565 ; *Chapman v. Smith*, 16 How. 114 ; *Rogers v. Libby*, 35 Me. 200 ; *Chamberlain v. Gailard*, 26 Ala. 504 ; *Demerit v. Lyford*, 27 N. H. 341.

they might, then the fact that they were actually decided, may and often must be proved by extrinsic evidence.¹

SEC. 99. A judgment on the merits, in a personal action, is a bar to another action, though the form of the two actions is not the same. It is the same cause of action where the same evidence will support both actions, though grounded on different writs,² and if a court of civil jurisdiction render a general verdict for the defendant, the presumption is that the whole case was decided, and not merely a particular branch of it.³ But it is only where the merits have been passed upon, or from the course of pleadings and trial that a judgment bars a subsequent suit; and in a case where the plaintiff failed to appear, and his suit was abated and dismissed, and the judgment was that the defendant recover five dollars and costs, it was held that this was no more than a nonsuit, and not a bar to a subsequent action on the merits.⁴ The dismissal of a former suit on the plaintiff's motion cannot be pleaded in bar to another action. So, a verdict in which no judgment is rendered, is not an estoppel.⁵ It is only where the point in issue has been determined that the judgment is a bar. If the suit is discontinued, or for any other cause there has been no judgment of the court upon the matter in issue, the proceedings are not conclusive. So also, to render a former judgment a complete bar, it must appear to have been a decision upon the merits, and this will be sufficient though the declaration was essentially defective, and would have been bad on demurrer,⁶ or if the trial went off on a technical defect,⁷ or because the debt was not yet due,⁸ or because the court had not jurisdiction,⁹ or because

¹ Young v. Rummell, 2 Hill 478; Gray v. Gillian, 15 Ill. 450; Littleton v. Richardson, 34 N. H. 79; Briggs v. Wells, 12 Barb. 567; Royce v. Burt, 42 id. 655; Babcock v. Camp, 12 Ohio S. 11.

² Lawrence v. Sherman, 3 Sumner, 20.

³ Stockton v. Ford, 18 Howard, 418; Fouget v. Perkins, 7 Howard, 160.

⁴ Haw v. Tiernan, 53 Penn. 192.

⁵ Reed v. Proprietors, 8 How. 274.

⁶ Hughes v. Blake, 1 515.

⁷ Homer v. Brown, 16 How. 354; Lane v. Harrison, Munf. 573; McDonald v. Rainor, 8 Johns. 442; Lepping v. Kedgewin, 1 Mod. 207.

⁸ N. E. Bank v. Lewis, 8 Pick. 113.

⁹ Estill v. Taul, 2 Yerg. 467.

of a temporary disability of the plaintiff to sue,¹ or if the judgment has been reversed in error which cannot be proved by the record, or the like, the judgment will be no bar to a future action, and the estoppel of a judgment will be set at large by the award of a new trial. But a judgment against one of several makers of a note, without process against the others, is a bar to a suit against those who were not parties to the first action.² Where an action of trover is brought, after a judgment in trespass, if title to the property was set up by the defendant in the first action, and it was found for him, it is clearly a bar to a second action for the same chattel, even though brought against one not a party to the former suit, but an accomplice in the original taking. So, a judgment for the defendant in trover upon trial of the merits, is a bar to an action for money had and received for the money arising from the sale of the same goods. But, where the plaintiff recovers judgment in trespass, without satisfaction, he is not estopped from afterward maintaining trover against another person for the same goods, for the reason that the principle of *transit in rem judicatum* extends no further than to bar another action for the same cause against the same party; the original judgment can imply nothing more than a promise by the defendant to pay the amount, and an agreement by the plaintiff that, upon payment of the money by the defendant, the chattel shall be his own; it is contrary to justice, and the analogies of the law, to deprive a man of his property without satisfaction, unless by his express consent. *Solutio pretii emptionis loco habetur*

SEC. 100. But where from the nature of the two actions, the cause of action cannot be the same in both, no averment will be received to the contrary. Therefore, in a writ of right, a plea in bar that the same title had been the sole subject of litigation in a former action of trespass, *quere clausum fregit*, or in a former writ of entry, between the same parties, or others privy in estate, was held to be a

¹ Dixon v. Sinclair, 4 Vt. 354.

² Mitchell v. Brewster, 28 Ill. 163.

bad plea.¹ A judgment in action of trespass, upon the issue *liberum tenementum*, is admissible in a subsequent action of ejectment between the same parties.² The effect of what occurs in one judicial proceeding upon another, is sometimes due to the principles of estoppel *in pais* rather than by record. A man who obtains or defeats a judgment by pleading, or representing an act or adjudication in one aspect, is estopped from giving it a different and inconsistent character in another suit founded upon the same subject matter. Pleading a former judgment as an estoppel, or taking advantage of it in any other way, will estop its being reversed on error; a party who leads a plaintiff to believe that he has given a recognizance for the appearance of the defendant, cannot subsequently show that the recognizance is void. So a married woman who sues her husband and recovers judgment as if she was sole, is estopped from appealing from a decree of divorce. A defendant who obtains judgment by impeaching an instrument, cannot rely on it as a defense in another suit brought by the same plaintiff. So a judgment may be used to show that the suit was determined, or in a proper cause, to prove the amount which a principal has been compelled to pay for the default of his agent; or the amount which a surety has been compelled to pay for the principal debtor; and, in general, to show the fact, that the judgment was actually rendered at such a time, and for such an amount.³

SEC. 101. A judgment may be admissible in evidence to establish its own existence and acts consequent upon it, in cases where it can not be used as an estoppel.⁴ For example, a surety may introduce a judgment against himself in an action against his principal, in order to show that he has been forced to pay, and the extent of the damage, and while a judgment against a master for the tortious act of his servant, establishes conclusively the amount of the loss resulting from

¹ Arnold v. Arnold, 17 Pick. 4; Bates v. Thompson, Id. 14, n.; Bennett v. Holmes, 1 Dev. & Bat. 486.

² Hoey v. Furman, 1 Penn. 295.

³ Lock v. Winston, 10 Ala. 849; King v. Chase, 15 N. H. 9; Green v. New River Co., 4 T. R. 589.

⁴ Garver v. State, 7 Penn. 265.

the act, it does not have the same conclusive effect as to the nature of the act itself.¹ Judgments on questions of title to lands are as conclusive on privies that is, on all who claim by descent or purchase through or under the person for or against whom they are rendered, as they are on the parties to the action. The same principle applies to chattels, for the reason that the title to chattels in the vendee depends on the title of the vendor, and whatever will operate as an estoppel against the vendor operates with the same effect against the vendee.² A record may also be admitted in evidence in favor of a stranger, against one of the parties, as containing a solemn admission, or judicial declaration by such party in regard to a certain fact. But in that case it is admitted not as a judgment conclusively establishing the fact, but as the deliberate declaration or admission of the party himself, that the fact was so. It is, therefore, to be treated in accordance with the principles governing admissions to which class of evidence it properly belongs. Thus, where a carrier brought trover against a person to whom he had delivered the goods intrusted to him, and which were lost, the record in the suit was held admissible for the owner in a subsequent action brought by him against the carrier, as amounting to a confession in a court of record, that he had the plaintiff's goods.³ So, also, when the plaintiff, in an action of trespass *quare clausum fregit*, claimed title by disseisin, against a grantee of the heirs of the disseisee, it was held, that the count in a writ of right sued by those heirs against him, might be given in evidence, as their declaration and admission that their ancestor died disseised, and that

¹ Bank of Oswego, 5 Hill, 152; McClure v. Whitesides, 2 Ind., 573; Green v. New River Co., 4 Term Rep. 589; R. R. Co. v. Smith, 7 Dana, 245; Huddlekauf v. Smith, 1 Md., 329; Doris v. State, 13 Penn., 140; Galena R. R. Co. v. Welch, 24 Ill. 31; Fletcher v. Jackson, 23 Vt. 581; Littleton v. Richardson, 34 N. H., 139

² Morgan v. Barker, 26 Vermont, 602; McCravey v. Remsen, 19 Ala. 430; Boynton v. Willard, 10 Pick. 111; Thompson v. Thompson, 31 Ala. 108; Cunningham v. Harris, Cal. 81; Cammell v. Sewel, 3 H. & N. 617; Marsh v. Pier, 4 Rawle, 273; Farmers Bank v. McKee, 2 Penn. 318.

³ Parsons v. Copeland, 33 Maine, 370; Bullers, N. P. 243; Tiley v. Cowling, 1 Lord Raym. Rep. 741.

the present plaintiff was in possession.¹ So where two had been sued as partners, and had suffered judgment, the record was held competent evidence of an admission of partnership in a subsequent action brought by a third person against them as partners.²

SEC. 102. Where separate actions are brought against several defendants for the same single act of trespass, the party last sued may plead the pendency of the first in abatement, and a recovery of one of several parties to a joint tort, frequently estops the plaintiff from proceeding against any other party not included in such action. Thus in an action against one for a battery, or for taking away the plaintiff's posts, or destroying grass in field, where several persons are concerned, the recovery against one will be a bar to an action against the others, and in these cases, the court will, in general, in a summary application, stay the proceedings in a second action, where it is manifest that the entire damage have been recovered in the first. A judgment in trespass *de bonis asportatis*, not satisfied, is a bar to an action against a co-trespasser,³ and it is a good defence by way of satisfaction, to an action against several persons that a former action was brought against them and another, a sum of money accepted from him and the suit dropped.⁴ A party against whom a judgment has been rendered on a verdict cannot, while the judgment remains in force, maintain an action against the other party jointly with others alleging that said verdict was unjust and false, and was procured by them by fraud and perjury, and by a conspiracy to effect that purpose. He is estopped by the judgment.⁵

¹ Robinson v. Swett, 3 Greenleaf, 316; Wells v. Compt., 3 Rob. Louisiana Rep 171.

² Craig v. Carleton, 22 Maine, 492.

³ Campbell v. Phelps, 1 Pick. 62.

⁴ Dufresne v. Hutchinson, 3 Taunt. 117.

⁵ Dunlap v. Glidden, 31 Maine, 435.

CHAPTER V.

JUDGMENTS IN REM.

SECTION 103. A judgment *in rem* is a judgment of a court of exclusive or at least peculiar jurisdiction, declaratory either of the nature and condition of some particular thing, or the condition or *status* of some particular person ; or, perhaps a better definition is, that it is an adjudication pronounced upon the *status* of some particular thing, or subject matter, by a tribunal having competent authority for that purpose, such an adjudication being a most solemn declaration of a court of competent jurisdiction that the *status* of the thing adjudicated upon *ipso facto*, renders it such as it declares it to be, and estops and precludes all persons from denying that the *status* of the thing operated upon is not what the court has declared it to be, and such judgments are conclusive not only upon parties and juries, but upon strangers. In fact, a judgment *in rem* is conclusive against the whole world. The term judgment *in rem*, strictly speaking, is somewhat objectionable when applied to the status of a person. The term itself is derived from the civil law, where actions were classed as *actiones in personam*, and *actiones in rem*. The former including actions upon contract or for injuries "*ex contractu vel ex maleficio*," while the latter referred to actions in which some particular thing was the subject matter of the controversy. "*Cum movet alicui de aliqua re controversiam*," under the roman law generally, a judgment "*in rem* was, "*in rem ipsam restituat (possessor) cum fructibus*."¹

SEC. 104. In the case of *Woodruff v. Taylor*,² the distinction between judgments *in rem* and *in personam* is so clearly and ably laid down that I cannot do better than quote from it. "The effect and purpose of a proceeding *in*

¹ 1 Inst. Lib. 4, Titles 16, 17, § 1, 2.

² 20 Vermont, 65.

rem is to ascertain the right of every possible claimant ; and it is instituted on an allegation that the title of the former owner, whoever he may be, has become divested, and notice is given to the whole world to appear and make claim to it. From the nature of the case the notice is constructive only to the greater part of the world ; but it is such as the law presumes will be most likely to reach the persons interested, and as such does, in point of fact, generally reach them. In case of seizure for violation of our revenue laws, the substance of the libel on which the forfeiture is claimed, with the order of the court thereon, specifying the time and place of trial, is to be published in a newspaper and to be posted up a certain number of days, and proclamation is also made in court for all persons interested to appear and contest the forfeiture. In every court, and in all countries, whose judgments are respected, notice of some kind is given. It is just as essential to the validity of a judgment *in rem* that constructive notice should appear at least to have been given, as that actual notice should appear in a record of a judgment *in personam*. A proceeding, professing to determine the right of property, where no notice, actual or constructive, is given, whatever else it might be called, would not entitle it to be dignified with the name of a judicial proceeding. It would be an arbitrary edict, not to be regarded anywhere as the judgment of a court."

SEC. 105. "A judgment *in rem* is an adjudication, pronounced upon the status of some particular subject matter, by a tribunal having competent authority for that purpose. It differs from a judgment *in personam* in this, that the latter judgment is in form as well as substance between the parties claiming the right, that it is so *inter partes* appears by the record itself. It is binding upon the parties appearing to be such by the record, and those claiming under or by them. A judgment *in rem* is founded on a proceeding, not as against the person, as such, but against the thing or subject matter itself, whose state or condition is to be determined. It is a proceeding to determine the state or condition of the thing itself, and the judgment is a solemn decla-

ration upon the status of the thing, and it *ipso facto* renders it what it declares it to be.

SEC. 106. The probate of a will is a familiar instance of a judgment *in rem*. The proceedings is in form and substance upon the will itself. No process is issued against any one in determining the state or condition of the instrument, but all persons are notified by a newspaper advertisement to appear and contest the probate, and the judgment is not that this or that person shall pay a sum of money or do any particular act, but that the instrument is or is not the will of the testator. It determines the status of the subject matter of the proceeding. The judgment is upon the thing itself, and when the proper steps required by law are taken the judgment is conclusive, and makes the instrument (as to all the world, at least, so far as the property within the state is concerned) just what the judgment of the court declares it ought to be. This is one instance upon a proceeding upon a written instrument to determine its state or condition, and that determination in its consequences involves and incidentally determines the rights of individuals to property affected by it.

SEC. 107. Proceedings *in rem* may be and often are upon personal chattels directly declaring the right to them in such cases. The proceeding is for the supposed violation by the property (so to speak) of some public law or regulation by which it is alleged that the title of the former owner has become divested. The property being seized a proceeding is then instituted against it upon an allegation stating the cause for which it has been forfeited, upon which public notice is given in some prescribed form to all persons to appear and contest the allegation. It is by no means certain that all persons having an interest in the property have actual notice of the proceeding, but if the thing itself upon which the proceeding is had be within the jurisdiction of the court, all persons interested are held to have constructive notice, and the sentence or decree of the court declaring the state or condition of the property is conclusive upon all the world. A sale of the property under such a sentence passes the right absolutely and further, in cases of

judgments in courts of admiralty they are also conclusive evidence of the facts stated in the decree to have been found by the courts as the basis of the decree, so the judgments of municipal courts acting *in rem* within the sphere of their jurisdiction would have the same effect.

SEC. 108. Under the term judgment *in rem* are included judgments of courts of admiralty relating to a prize or a judgment of condemnation, confiscation or forfeiture under the revenue or excise laws, and the judgments of all other courts directly upon the personal status or relations of the party such as marriage, divorce, bastardy, settlement, an adjudication by a competent tribunal of a question of descent or pedigree. The decision of a court of probate, orphans' courts, guardians' courts, courts of ordinary, surrogates' courts, courts martial, ecclesiastical and spiritual courts, courts having probate jurisdiction upon the validity of a will. The settlement of the accounts of an administrator, executor or guardian, or a court having jurisdiction in bankruptcy or insolvency matters, as an order discharging the person or estate of a bankrupt from the obligation of his debts estops all parties from disputing the point decreed whether they were or were not parties to the proceeding in which the decree was made. So a judgment or decree regarding the legal status or authority of parties, for they operate precisely like a judgment of condemnation or forfeiture in rendering the person what they pronounce him to be, as the grant of letters testamentary or administration, the appointment of a guardian or the naturalization of an alien.

SEC. 109. In regard to courts of admiralty or prize the very nature of the question of prize is beyond the jurisdiction of common law and state courts, for the reason that the jurisdiction is exclusively vested in courts of admiralty which in this country are United States courts whose jurisdiction alone can extend on the high seas. The federal courts have exclusive jurisdiction of all seizures whether made on land or water for a breach of the laws of the United States, while the admiralty jurisdiction of the district courts extends to all cases of seizure in waters navigable by vessels of ten or more tons burthen, therefore they must be conclusive on

all other courts. In the English courts of exchequer as well as in American courts where proceedings *in rem* have been commenced, it is conclusive evidence to any other court as well as to all the world that the goods are liable to be seized for the reason that by the judgment of condemnation the title to the property is irrevocably changed and vested in the government; it is the judgment of condemnation that changes the title and not the act of seizure,¹ therefore a judgment in an admiralty or prize court condemning a vessel as enemy's property or for violation of international law, binds the property though obtained without notice to the party interested, and is final and conclusive upon all other courts; and a sale made in pursuance thereof vests an indefeasible title in the purchaser against the world, no matter how deficient the title may have been of the parties who were in possession of the vessel through whose acts the forfeiture was occasioned,² and it follows as a necessary consequence that there can be no action maintained either in trespass or trover for taking the property.³

SEC. 110. The same principle applies to a decree of any competent tribunal, that property has been forfeited for a breach of a municipal law or local regulation which decrees a sale as the means of carrying the forfeiture into effect,"⁴ or for a libel filed for repairs or supplies, furnished to a vessel, whether the action is in an admiralty or in a state court, under a special enactment.⁵ So a judgment ordering the sale of a foreign vessel, by the master of it, which has stranded within the jurisdiction of the court decreeing the sale, is conclusive upon all the world and estops all persons from questioning the title of the purchaser, in any foreign country, where the vessel may be taken after being got off and repaired. It is therefore evident that this class of judg-

¹ Cook v. Howard, 13 Johns., 276; LeCaux v. Eden, 2 Doug. 614, n.

² The Rose v. Huntley, 4 Cranch., 291; The Globe, 2 B. C. C. R., 427; Bradstreet v. Nep. Ins. Co. 3 Sumner, 600; Crousdon v. Leonard, 4 Cranch, 494

³ Scott v. Shearman, 2 Wm. Blackstone, 979; Geffer v. Aguilar, 7 T. R., 696; Bullers N. P. 244.

⁴ Gelston v. Hoyt, 3 Wheat. 246; Megee v. Beirne, 39 Penn., Hudson v. Gustee, 4 Cranch. 295.

⁵ The Globe, 2 B. C. C. R. 427; Thompson v. Steamboat Morton, 2 Ohio, S. 36; Cammel v. Sewell, 3 H. & N. 617.

ments are conclusive, not only upon the parties interested, but upon third parties who are termed strangers. The reasons therefore are, first, that in such cases, where the *Res* is the subject matter of the litigation, every one who has any interest or can possibly be affected by the judgment, is entitled to appear and assert his own rights by becoming and being made an actual party to the proceedings. 2nd. on the principle *Interest reipublicae ut sit finis litium*, it is essential to the peace and tranquility of community, that questions of this kind should not be left in doubt; but, that our domestic and social relations should be clearly defined and conclusively settled and at rest, and on this ground, such judgments can neither be set aside or impeached collaterally, either by parties or strangers, on any other ground than the want of authority or jurisdiction of the tribunal rendering the judgment or decree. Some instances may be found where this class of judgments partake of the nature of judgments *in personam*, as for example. The Federal Courts have jurisdiction of Revenue cases. They declare property forfeited for a violation of the revenue laws of the United States, and while the judgment of forfeiture is conclusive upon the whole world, as regards the property forfeited, the judgment of the same court in the same action, for the same violation of the revenue laws, convicting the party is not so, because that is a judgment *in personam*. But, a proceeding *in rem* can effect only the property attached or described in the bill, and when the proceeding is under some statutory provision all the forms must be strictly complied with and pursued, or the judgment loses the conclusive effect attached to proceedings *in rem*.¹

SEC. 111. Another class of proceedings *in rem* are actions brought for the recovery of title to real estate, but they are commenced by personal service or notice by publication as in actions *in personam*. The force of the judgment in regard to its conclusive effect is limited primarily and exclusively to the matter or land in litigation. The estoppel is limited to those who have been made parties to the action by appearance or service of process. Natural

¹Boswell v. Dickenson, 4 McLean, 262.

justice as embodied in the fundamental principle of the law. *Res inter alios acta alteri nocere non debet* will not suffer the title of third persons or strangers to the litigation to be barred by any order or execution based on such a judgment,¹ as for example judgments in ejectment are executed by a writ which transfers the title from the defendant to the plaintiff, and as they operate upon the *Res* they are judgments *in rem*, but in all other respects they operate as judgments *in personam* as they do not and cannot effect the title of strangers to the action who were in no wise interested or made parties to it,² and this principle is not applicable to proceedings which pursue the course of common law, but of those which are founded and regulated by statute.³

SEC. 112. All persons in every part of the world are concluded by the sentence of a prize court in a case clearly coming within its jurisdiction. A prize court having rendered a decree has no power to re-open it after the expiration of the term at which it was rendered.⁴ A judgment *in rem* is conclusive, and binds the property, though obtained without notice to the party interested. So a sentence of a United States District Court on the question of forfeiture, under the laws of the United States, is conclusive, and the question cannot be again litigated in a common law court, and an admiralty decree in a proceeding *in rem* for a forfeiture, is conclusive upon all parties claiming an interest in the thing. But a decree in a statutory proceeding is not conclusive, unless the forms be strictly pursued, and a proceeding *in rem* can only effect the property attached as described in the bill. Justice Story in an elaborate opinion says: When property is seized, and libelled as forfeited to the government, the sole object of the suit is, to ascertain whether the seizure be rightful and the forfeiture incurred or not? A judgment or decree, acts upon the property

¹ Jackson v. Brown, 3 Johns. 459; Ragans Est. 7 Watts, 440.

² Decosta v. Atkins, Bullers, N. P. 87; Hunter v. Butts, 3 Camp. 46; Chirac v. Reinecker, 11 Wheat. 280; Reid v. Stanley, 6 W. & S. 369; Chirac v. Reinecker; 2 Peters, 613; Den v. White, 7 T. R. 112.

³ Hollingsworth v. Barbour, 4 Peters, 475; Williams v. Ball, 8 Howard, 566; Boswell v. Dickinson, 4 McLean; Ege v. Sidee, 3 Penn. 124; McKee v. McKee, 38 Penn. 231.

⁴ Lizzie Weston, Bl. Pr. cases, 246; The Major Barbour, 1b. 330.

seized and forfeited, and is conclusive upon the whole world. If the judgment is one of condemnation, it completely changes the title of the property, and the new title thus acquired by, and through the forfeiture, travels with the thing in all its future progress. If on the other hand, it is acquitted, the taint of forfeiture is completely removed, and cannot be re-annexed to it. The original owner stands upon his title discharged of any latent claims, with which the supposed forfeiture may have previously infected it. A sentence of acquittal *in rem*, ascertains a fact as much as a sentence of condemnation; it ascertains and fixes the fact that the property is not liable to the asserted claims of forfeiture, and it is therefore conclusive upon all the world of the non-existence of the title of forfeiture, for the same reason, that a sentence of condemnation is conclusive of the existence of the title of forfeiture. It would be strange indeed, if when the forfeiture *ex directo*, could not be enforced against the thing, but by an acquittal, was completely purged away, that the forfeiture might be indirectly enforced through the seizing officer; and that he should be at liberty to assert a title for the government, which is judicially abandoned by, or conclusively established against the government itself; because the decree of a court of competent jurisdiction *in rem*, is as to the points directly in judgment conclusive upon the whole world,¹ and in this connection it is to be remembered, that whenever a question arises in which the authority of a legal tribunal is to be exercised in regard to a specific thing; the decision is conclusive, not only upon the *Res* itself, but upon the question, and it estops all contradiction in any other litigation with reference to the same property between persons who were not parties to the judgment, and founded on a contract prior to the time when the decision was rendered in reference to the same property, although between persons not parties to the former action, and founded on a contract previous to its rendition. A decree by a court of admiralty condemning a vessel, for a violation of the revenue law of a foreign country,

¹ *Gelston v. Hoyt*, 3 Wheat. 246.

or a breach of a blockade, will not only convey an indefeasible title to those who become purchasers under the decree, but it is conclusive evidence of the cause of condemnation in any action that may arise between the owners of the vessel and the insurers.¹ A decree apportioning a loss occasioned by a collision at sea, is not only conclusive, in a subsequent action by the insurers of the loss and share of each vessel, but of the cause and nature of the collision.²

SEC. 113. The universal effect of a judgment *in rem* is that it is a solemn declaration of a court of competent jurisdiction upon the status of a thing which very declaration operates upon the status of the thing adjudicated upon, and renders it *ipso facto*, such as it is thereby declared to be, and is therefore binding upon the whole world. Thus a condemnation of goods or a prize, not only declares them liable to forfeiture, but accomplishes the forfeiture accordingly. When the status of a thing is thus altered, it follows that the judgment altering it must estop the whole world, for it would be absurd to try the question whether a thing was or was not what it is declared to be, when the judgment has not only declared but rendered it such, and where the title to the property is changed and irrevocably vested in the government by a judgment of condemnation. Neither trover or trespass will lie for taking them in an orderly manner, and this must be the meaning of the doctrine as laid down by Lord Coke, in 1st Inst., 352, (b) where he states that "where the record of the estoppel runs to the disability of, or legitimization of the person, there all strangers shall take the benefit of that record as *outlawrie*, *excommunication*, *profession*, *attainder of praemuneri*, &c., *felonie*, &c., *bastardie*, *mulierie*, and shall conclude the parties, *though they be strangers to the record*." In all these cases the record operates upon the status of the individual. The judgment of *outlawrie* not merely declares the party an outlaw, but renders him so; and is, therefore, a judgment *in rem*. It, therefore,

¹ Croudson v. Leonard, 4 Cranch, 434; 3 Sumner, 600; Baxter v. N. E. M. Ins. Co., 6 Mass. 277; 4 Ellis & Bl. 788.

² Magoun v. New England M. Ins. Co., 1 Story, 157; 12 Richardson, 13, 3 Sumner, 228.

seems impossible to say that where the *status* of the thing is actually operated upon, that operation shall be of less effect, because some other court, had it been called upon, might have produced a similar one. It may happen that after a court of competent jurisdiction has decreed *in rem*, some other court proceeding *in rem* may pronounce a contrary decree on the same subject matter. But that tribunal assumes a power of appeal, and it is as a judgment of an appellate court that its decision can be looked on as warrantable.

SEC. 114. A judicial sentence *in rem* will be conclusive on all the world, whether a corporation, state or United States, was plaintiff, or an individual. A judgment is equally conclusive, which ever way it is pronounced, whether it be of forfeiture or acquittal, and if it be the latter, is as effectual an estoppel as though it was of condemnation, in justifying the conduct of the officers seizing the property on the ground that it had incurred a forfeiture, as a judgment of condemnation would be in estopping the owners from averring that the seizure was illegal and no forfeiture had occurred. The decisions *in rem* are conclusive, not only upon the parties actually litigating in the cause, but upon the whole world, for the reason, that in cases of property seized and proceeded against, every one who has a right to appear and assert his own rights by being made or becoming parties to the proceedings, and upon the maxim, *Interest reipublicae ut sit finis, litium*. It is essential to the peace and tranquility of the community that questions of this kind should not be left in doubt; but that our domestic relations should be clearly defined and conclusively settled and at rest, and so well are they settled, that decrees *in rem* cannot be set aside or impeached collaterally, either by parties or strangers, on any other ground than want of authority, or jurisdiction in the court in which the judgment was rendered. But no judgment *in rem* can be binding unless the situation of the property seized, or to be seized, is such as to render it amenable to the authority of the court which renders the decree, or unless the proceedings are conducted in accordance with the well established forms and principles which the juris-

prudence of all countries regard as essential to the safety and validity of judicial actions. And it also depends upon the fact whether the court had power to make a decree of that kind, and whether the property was so situated that the exercise of the judicial power would be effectual in rendering it what it declared it to be. In order to render a judgment, sentence or decree *in rem*, the right arises from an actual or constructive possession of the *Res*, acquired or held in such a way as to make it a fit subject for adjudication, and when this has been once acquired by a duly authorized tribunal, no other is allowed to interfere with the tribunal which first obtains jurisdiction, until the first tribunal has fully adjudicated all matters connected therewith.

SEC. 115. As a general rule strangers are not bound by nor can they take advantage of an estoppel, and it is not to be presumed that the law intends parties to be bound by proceedings to which they were strangers and had no opportunity of being heard; for instance, where a vessel is sold at a sheriff's sale under a judgment rendered in an action upon an account for goods, wares and merchandise sold and delivered in the shape of supplies or necessities, will not estop third parties notwithstanding service was made by publication, and "interested parties notified to show cause unless by special statutory enactment by the legislature of the state in which the proceedings are had, such actions being made proceedings *in rem*, thus obviating the necessity of having the interested parties in court as is done by the statute of Missouri.¹ But it has since been decided that state legislatures have no authority to create maritime liens or confer jurisdiction upon state courts to enforce such liens by proceedings *in rem*. Such jurisdiction is vested exclusively in the courts of admiralty of the United States.² Where proceedings for the recovery of land are invested with the character of proceedings *in rem*, by the statutes of the state in which the land is located the judgment is as conclusive as any other decree *in rem*, because it declares the land to belong to the successful party

¹ Ritter v. Jamestown, 23 Mo. 348.

² Deever v. Steamer Hope, A. L. R., 683; The Belfast, 7 Wall., 634.

and the judgment renders it his, and no foreign court can either interfere or review the decree with a view or for the purpose of redressing any injustice that might have been or was committed.

SEC. 116. Fraud will vitiate any contract or judgment and may be pleaded either in a judgment *inter partes* or *in rem*, and it makes no difference whether they are foreign or domestic judgments, but it must be understood with this proviso that fraud, collusion or covin, must be proven and not deduced from mere inference. This may be done when they are urged against strangers to the proceedings who have had no opportunity to appear and take the necessary step for their protection, and may be plead either collaterally or in a direct proceeding. Estoppels *in rem* are subject to the same limitations which are applicable to those *in personam*, and are limited only to the subject matter in litigation and will not be extended in any way by intendment or implication.

SEC. 117. Besides the class of cases referred to in the preceding sections there is another class which to a great extent may be considered proceedings *in rem*, while in form they are proceedings *between parties* or *in personam*. Proceedings in attachment are in the nature of, but not strictly a proceeding *in rem*. A proceeding *in rem* is that in which the process is served on the thing itself and the mere possession of the thing itself by the service of the process, and making proclamation authorizes the court to decide upon it without notice to any individual whatever. In England all the notice the defendant has is by the attachment of his property, while in this country the writ of attachment is usually preceded or accompanied by a summons, and service made on the defendant either personally or by publication. If personal service is had on the defendant and judgment is rendered, it is *in personam*. But an attachment of property where the court has jurisdiction of the *Res*, but not of the *person* of the defendant, and a sale of it or a levy upon it, if it be real estate, is in the nature of a proceeding *in rem*. The judgment, if the defendant have no notice, is treated as a nullity, outside and beyond the jurisdiction of the court

rendering the judgment, so far as the person of the defendant is concerned, though it will be held binding as between the parties so far as regards the property, as a proceeding *in rem*. The defendant cannot recover back the property in another jurisdiction. The status of the property is determined by the proceeding. But the proceeding will not in any way effect the status of the property as to other persons than the parties to the record and those claiming by or under them.

SEC. 118. The distinction between proceedings by attachment and by garnishment, is that the latter is a peculiar process by which the effects of the defendant which cannot be seized and taken into custody as in attachment, may still be rendered liable to the payment of his debts. Garnishment is more in the nature of proceedings *in rem* than attachment, since its aim is to invest the plaintiff with the right and power to appropriate, to the satisfaction of his claim against the defendant, property of the defendant in the garnishee's hands, or a debt due from the garnishee to the defendant. It is virtually, a suit by the defendant, in the name of the plaintiff against the garnishee, without reference to the defendant's concurrence and against his will.¹ The distinction between these proceedings and proceedings *in rem*, is that the latter are directed against the things themselves and only operate incidentally upon the rights of parties; while attachments and garnishments use the hold they have obtained by the seizure of specific property as the means of reaching and giving effect to the rights of parties, and exercises no controlling authority over the rights of strangers, so that attachment and garnishment, strictly speaking, are not proceedings *in rem*.

SEC. 119. Where one is by garnishment involuntarily made a party to a suit in which he has no personal interest, he is fully protected by the proceedings in law, provided he acts in obedience to the orders of the court, in the surrender and payment of the property attached. As a garnishee is a mere stakeholder for the parties to the suit, he is in a position in which he cannot act voluntarily without danger to his

¹ Drake on Attachment, § 452.

own interest. No voluntary payment after garnishment by the garnishee of his debt to the defendant, and with a knowledge on his part of its existence will estop his liability as a garnishee, but if it is paid before garnishment it is as complete a defence as it would be in an action against him by the defendant for the same debt. In order then to have the protection and benefit of the estoppel he can only surrender the property or pay the debt in obedience to the order of the court which issues the execution and thus will protect him not only as against the defendant, but against all parties claiming under him by virtue of a grant or assignment subsequent to the issuing of the garnishment or attachment. Nor can a garnishee interfere or inquire into the proceedings when the jurisdiction of the court extends over the defendant and garnishee; all that he is interested in is that the proceedings shall protect him in any subsequent action against him for the same debt, and against a second payment neither can he avoid or reverse a judgment for irregularities, he is bound by the judgment. The operation of a judgment against a garnishee is compulsory. He has no choice but to pay in obedience to the judgment of the court to whose jurisdiction he has been subjected; the exercise of that jurisdiction effects a confiscation of the debt due by the garnishee to the defendant, for the plaintiff's benefit.¹

SEC. 120. A judgment rendered against a garnishee by a court having jurisdiction of both the action and the person of the garnishee, and if he has satisfied it in due course of law, is conclusive against parties and privies, of all matters of right and title, decided by the court, and constitutes a complete defence to any subsequent action by the defendant against the garnishee for the amount he was compelled to pay, and this, though the court be a foreign tribunal. But the judgment does not affect any one not a party or privy to it. A judgment in favor of a garnishee is just as conclusive against the plaintiff, although it was obtained by fraud and perjury committed by the garnishee. But a judgment in favor of a garnishee will not estop his being charged in another suit by a different party, on account of

¹ Drake on Attachment.

the same debt, for the obvious reason that judgments bind only parties and privies, not strangers. Nor is a judgment against a garnishee *res adjudicata*, between him and the defendant so as to estop the defendant from claiming more in his action than the garnishee was considered in the attachment proceedings, to owe ; if it was, it would enable a garnishee to practice a fraud upon his creditor by confessing in his answer a smaller indebtedness than actually existed.

SEC. 121. Where a part or the whole of a debt of the garnishee to the defendant has been paid under the judgment against him, such payment is as effectual an estoppel either *pro tanto* or completely to a subsequent action by the defendant, as if the payment had been made to the defendant himself. In an action against a garnishee, by his creditor, the attachment defendant, where there was no allegation in the agreed statement of facts, that the amount of the judgment against the garnishee was equal to his debt to the defendant, it was presumed it was so.¹ A payment of a debt by one of several joint debtors under garnishment, is a good defence by way of estoppel in a subsequent suit brought against them by the defendant in the attachment suit.² But a judgment rendered on the attachment for a debt or fund, or specific assets of any other description will not estop third parties from asserting a paramount or adverse right to the property attached, or growing out of its negotiation, when it is negotiable security. An attachment will not be a protection against an equitable assignee who claims under the defendant, and not paramount to him, if the garnishee knew of the assignment and failed to plead or give it in evidence against the attaching creditor, unless the assignee was duly notified and opportunity given to come in and defend in person. Nor can a sheriff rely upon an attachment against A. for seizing the goods of B. even when the proceedings result in a judgment in favor of the attaching creditor, and where he is ordered to sell the goods on account of their perishable nature, while it may be a sufficient justification for the sale ; it will not relate back or justify the original seizure ; for the

¹ McAllister v. Brooks, 22 Maine, 80.

² Cook v. Field, 4 Ala. 53.

obvious reason that a judgment against the defendant or garnishee, can effect only the property of the defendant not strangers, and does not authorize the seizure of property belonging to third persons, for the defendant's debt. ~~~

SEC. 122. In regard to negotiable notes they cannot properly be made the subject of attachment, as will be seen by the following principles of law laid down by Drake in his admirable work on Attachments. 1st. It is impossible to charge a garnishee as a debtor of the defendant, unless it *appear affirmatively* that at the time of the garnishment, the defendant had a cause of action against him, for the recovery of a legal debt due, or to become due by the efflux of time. 2d. The attachment plaintiff can hold the garnishee only so far as the defendant might hold him by an action at law. 3d. The garnishee is under no circumstances to be placed by the garnishment in a worse condition than he would otherwise be. 4th. No judgment should be rendered against him as garnishee, where he answers fairly and fully, unless it would be available as a defence against any action afterwards brought against him on the debt, in respect of which he is charged. Applying these well established principles to this subject, it seems that a negotiable instrument can not properly be made the subject of an attachment while still running and before it has reached maturity. It bears the character of negotiable paper until it is due and no operation which can be given to the garnishment of the maker, can change its nature in this respect. As long as it is negotiable, it is difficult for the maker to say who the possessor or holder may be when it reaches maturity. If the maker is garnisheed in an action against the payee, and answers that he does not know whether he is indebted or not, or may be indebted to the payee, there is no doubt that the answer is insufficient to charge him, without the risk of making him liable twice over for the same debt. For the reason that his obligation is not to pay to any particular person, but to the holder at maturity whoever he may be, and as neither the garnishee, the defendant, or the court, can say that the defendant will be the holder of the note at its maturity, a judgment against

the garnishee assumes he will be, and necessarily renders him liable to pay the same debt twice. For this reason no judgment can be rendered without placing the garnishee in a worse situation than he would otherwise be in by requiring him to pay to the plaintiff what he may from the character of the paper, in all probability be compelled to pay again to the innocent holder of the note. For although privies are bound by the result of a judicial proceeding between the parties under whom they claim, and the assignee of an overdue note or chose in action is in privity with the assignor, and can assert no right which has been barred by judgment against him. The indorsement of a note before it is due for value, and without notice, does not fall within the same principle as the assignment of an overdue note. If a note which passes from hand to hand as cash; on which the holder may institute suit in his own name, has all the properties of a bank note payable to bearer, which would be embraced by a bequest of money, and which may be actually in circulation in another state or country, should be adjudged to be liable to attachment before maturity, it would not only overthrow an essential part of the commercial system but annihilate the negotiable qualities of all such instruments,¹ and unless it is affirmatively shown that, before the rendition of the judgment the note had become due, and was then still the property of the payee. The maker of the note cannot be charged as garnishee of the payee without violating sound and well established principles of commercial law, justice and equity. *Bona fides non patitur ibi idem exigatur.* Unless it is done as was the case in *Kieffer v. Ehler*, by impounding the note and holding it until it was due. The doctrine of *lis pendens* is not applicable to a proceeding like attachment, which does not specifically limit the property involved, and constructive notice cannot supply the place of actual, in the case of negotiable paper which passes freely from hand to hand. Payment by compulsion of law is a good defence against the creditor when it is legal, rightful, and strictly within the order of the court; but a judgment or decree assuming to reach beyond the parties, and estop persons who

¹ *Ludlow v. Bingham*, 4 Dallas, 47.

have not been summoned or had an opportunity to be heard in their own defence is not only contrary to right and justice but is absolutely void for want of jurisdiction.¹

SEC. 123. In a suit by the attachment defendant against a garnishee, a payment under a judgment against the garnishee will be effectual as a defence by estoppel if properly pleaded. In order to render it effectual, the garnishee must prove the judgment under which he made the payment; that it was a valid judgment, for a payment under a void judgment, no matter how apparently regular the proceeding may have been, cannot protect him against the defendant or his representatives. That the payment was not voluntary. That it was an actual payment not pretended or contrived. That the court which rendered the judgment had jurisdiction of the subject matter and the parties. If there be a defect in this respect the payment is regarded as voluntary. But if it had jurisdiction, no matter how irregular the proceeding may have been, it is as good as an estoppel; even a reversal on error after payment by the garnishee will not invalidate the payment; if he contest the jurisdiction of the court, and his objection is overruled and judgment is rendered against him it will be conclusive in his favor. If the law requires the plaintiff to perform as a condition precedent to obtaining execution a particular act to be performed, such as filing a bond, and without its performance the garnishee makes payment under it, the payment will be no protection as it is regarded as voluntary. In order to entitle one to plead an attachment as a conclusive defence, there must be no neglect, collusion, or misrepresentation on his part in the progress of the attachment suit; if there is, then there is no estoppel against the creditor. A garnishee is not obliged to watch the regularity of proceedings in the suit in which he is garnisheed, nor can he be held in any way responsible for them. The answer of the garnishee being the basis of the judgment, his liability being therein set forth the record will sufficiently establish his defence when sued by the attachment defendant, unless he allows judgment to go by default, then it must be proved by parol evidence. In assumpsit the

¹ Kiefer v. Ehler 18 Penn. St. 388.

judgment and execution in attachment may be plead specially or given in evidence under the general issue, but in debt on bond it must be pleaded specially, if not pleaded properly, or the defendant fails for want of a proper plea. The garnishee will have no remedy either in law or equity but to pay the debt over again. A payment by a garnishee in obedience to the order of the court in which he has been attached, will be effectual as an estoppel in any subsequent suit against him for the same debt, whether the proceedings took place in a domestic or foreign tribunal, and whether they were or were not conclusive as regards the other parties to the action, because a payment made in good faith and by compulsion of law, exonerates the person who makes it, from further responsibility and remits those entitled to the fund to an action against whom it is received. So a creditor who takes part in defending an attachment on the ground that the debt attached was due to him, is estopped from denying the validity of the attachment subsequently, as against the plaintiff and garnishee.¹ But proceedings commenced by attachment can not be binding unless the thing attached is within the State or district over which the authority of the court extends, or jurisdiction is acquired by personal service upon the garnishee, and a party can, under any and all circumstances, show that the thing attached was not subject to attachment.

SEC. 124. The proceedings in foreign attachment partake still more of the nature of a proceeding *in rem*; its operation is, however, limited in character. The suit is between the parties, and, as a proceeding *in rem*, it must be confined to such parties. A writ is issued in favor of the plaintiff, declaring against his debtor, residing in a foreign government, and alleging, also, that another person, named in the writ

¹ Peterson v. Lathrop, 34 Penn., 223; Richards v. Watson, 23 Mo., 34; Tarleton v. Johnston, 25 Ala., 300.

In a late case in the U. S. Supreme Court, *Miller's Exrs. v. U. S.* 11 or 12 Wallace. that court decided that proceedings by garnishment and attachment against negotiable paper was a valid seizure, and that the return was conclusive as to the seizure, and that it held the property, and that the *res* was then in possession of the U. S. Marshal reversing *Pelham v. Rose*, in 9 Wallace.

and styled a trustee or garnishee, has goods in his hands belonging to the attachment defendant, or is indebted to him, praying that the goods or debt found within the jurisdiction of the court from which the process issues, may be declared forfeited to the plaintiff, or, strictly speaking, that the property be appropriated in satisfaction and payment of the plaintiff's demand. Where the court has jurisdiction, its proceedings are *in rem*, after publication, which constructively notifies the defendant of the proceedings against the property. The court adjudicates upon the property, the thing itself, and orders it sold or delivered to the plaintiff in payment of his debt. The judgment changes the status of the property or debt, it deprives the attachment defendant of all title to it ; and is binding and conclusive upon all the parties to the proceeding. The foreign creditor of the trustee or garnishee having placed his property within the jurisdiction of the court rendering the judgment, is estopped from prosecuting his claim against the garnishee in any other jurisdiction.

SEC. 125. The operation of this proceeding *in rem* is limited to the parties to it, and does not affect the right, title or interest of any other person having an independent or adverse claim to the goods or debt, which was the subject matter of the suit, for the reason that the court does not pretend to notify such adverse claimant either constructively or otherwise, nor do the proceedings determine the right of any persons except those who are parties of record to it. These limited proceedings *in rem*, are not based upon any allegation that the right of property is to be determined between any other person than the parties to the suit, no notice is given to any other persons, the judgment being only as to the status of the property between the parties of record, it is, as to all other persons, a mere nullity. Whenever a court of competent jurisdiction assumes the control or custody of a particular thing, its proceedings are then *in rem*, and are so regarded whenever it is necessary, for the protection of either of the parties to the proceeding or the property itself. A purchaser of property under a sheriff's sale made by order of the court on account of the perishable nature of the

property, will obtain a good title against the world, no matter how defective or irregular the attachment proceedings may be.¹ The sale of a ship seized under proceedings in foreign attachment, by a court of common law, under an order that it should be sold as perishable property, and the proceeds paid into court, was held to pass a good title against the world, and divested the title of the seamen for their wages, and remitted them to the fund arising from the sale.² The estoppel, in such cases, is founded on the action of the court in its ministerial capacity, and it may be founded on the acts of persons who are destitute of judicial power, whose authority is derived solely from necessity.³ A sale made by a master of a vessel, in case of necessity, will pass a good title, not only as against those by whom he was himself appointed, but against third persons claiming under an independent right or title. The right to sell under such circumstances, carries with it the right to confer a new and indefeasible title on the purchaser, founded on the necessity of the sale. A judgment in an action for trover or trespass, brought by the finder of a chattel against a third person, by whom it has been wrongfully taken or detained, will operate as an estoppel *in rem*, and vest a good title in the defendant against all the world, because the nature of the action compels the plaintiff to act for unknown and absent owners of the property found, and renders it necessary that the defendant should be protected from being made answerable a second time in damages for the same thing. The estoppel in such cases is essentially an estoppel *in pais*, deriving its force from the circumstances which creates it; and unless they are such as to give it birth, it will have no existence, no matter how regular or formal the proceedings on which it assumes to be founded, and a decree of a tribunal that an injured vessel shall be sold, will pass no title, unless the sale would have been valid if made by the master, in case of necessity, without a decree, or the proceeding is strictly *in rem*, and the

¹ Woodruff v. Taylor, 20 Vt. 65.

² Cayl v. Taylor, 24 Penn. St. 259; 1 Wallace, Jr. 311; 20 Howard, 583.

³ Mankin v. Chancellor, 2 Brock. 125.

court duly authorized to bind the parties without giving them an opportunity to be heard.¹

SEC. 126. The same rule applies to proceedings in replevin, where the authority to seize specific property is given, solely with a view to the determination of the right of property between the plaintiff and defendant, the judgment will not estop the subsequent assertion of a distinct and adverse title by a third person. There is no conflict or inconsistency between successive writs of replevin or attachment by different persons for the same property. Replevin may be maintained by one man for the recovery of chattels that have been seized under an attachment against another, because an authority to take the goods of A. will not be a justification for taking the goods of B. While a judgment in replevin, although limited to the *Res*, is not *in rem*, and will not be conclusive on third persons; the writ can be pleaded as a justification by the sheriff against all the world.

SEC. 127. Besides the actions mentioned, there are still another class which partake of the nature of proceedings *in rem*, and the determination of the tribunals having jurisdiction may be *in rem* and *personam*. The proceedings in England of Ecclesiastical Courts, Spiritual Courts, and in America of Probate Courts, Courts of Ordinary, Surrogate Courts, Orphans' Courts, and all other courts, whatever their appellation may be, which have jurisdiction of the sale of a decedent's estate for the payment of his debts, or for the purpose of facilitating or effecting the distribution of a decedent's estate among his heirs. Proceedings of this nature are usually commenced on petition, or notice by publication, and partake, to a great extent, of the same conclusive effect and nature as that accorded to proceedings *in rem*, or rather in Admiralty and Prize Courts. All parties claiming title from or under a decedent are bound by the decree, whether they were made parties or not. In England, the courts having special jurisdiction of matters of probate, marriage and divorce are termed Ecclesiastical or Spiritual Courts. They decide directly upon the legality of marriages, compel specific performance of a contract of marriage,

¹ 2 Smith's Leading Cases, 836.

or for restitution of conjugal rights, &c. There are no such courts in this country. But the courts above mentioned are placed on the same basis as the Ecclesiastical and Spiritual Courts of England. The action *causa jactitationis matrimonii*, and that for the restitution of conjugal rights are unknown to our law, and an action to enforce the celebration of a marriage, in accordance with a former contract, is an action that has never been heard of in American courts, the general rule being the converse of this, the action being for a dissolution of the marriage contract. In another portion of this work I will show that in actions of divorce on any of the various grounds on which a decree is granted, by the various tribunals in the United States, though not by Ecclesiastical Courts, they have the same conclusive effect in every State in the Union as is accorded them in the State where they are granted.

SEC. 128. Proceedings in Surrogates' Courts, Orphans' and Guardians' Courts, County Courts, Courts of Ordinary, Probate Courts, and other courts having a limited jurisdiction, that of the disposition of the estate of decedents, their decrees are conclusive evidence in regard to the real as well as the personal estate of the intestate. It is a general rule of law, that where any matter belongs to the jurisdiction of one court, so peculiarly that other courts can only take cognizance of the same subject incidentally and collaterally, the latter are bound by the sentence of the latter and must give credence to it.¹ A probate is the only legal and legitimate evidence of personal property being vested in an executor, or of his appointment, and is conclusive evidence of this fact, and letters of administration are conclusive of the appointment of the administrator. A grant of *probate*, or of *administration*, is in the nature of a decree *in rem*, and actually invests the executor or administrator with the character which it declares belongs to him. Accordingly such grant of probate or administration is conclusive against all the world.

SEC. 129. In regard to the decrees and sentences of courts exercising any branches of Ecclesiastical jurisdiction, they

¹ McPherson v. Cunliff, 11 S. & R. 429; Hargraves' Law Tracts, 452; Cassels v. Vernon, 5 Mass. 534.

are governed by the same general principles already stated. The principal branch of this jurisdiction, existing in the United States, is that relating to matters of *probate and administration*. In this, as in other cases, the limitation is as to whether the matter was exclusively within the jurisdiction of the court, and whether a decree or judgment has been passed directly upon it. If jurisdiction has attached, the decree is conclusive. Where the decree is of the nature of proceedings *in rem*, as is generally the case in matters of probate and administration, it is conclusive, like those proceedings, against all the world. But where it is a matter of exclusively private litigation, such as in assignment of dower, and some other cases of jurisdiction conferred by particular statutes, the decree is subject to the same rules as judgments in other actions. Thus, the probate of a will, at least, as to the personalty, is conclusive in civil causes, in all questions upon its execution and validity.¹ The grant of letters of administration is, in general, conclusive evidence of the intestate's death; for only upon evidence of death, are they granted.² But the grant of administration upon a woman's estate determines nothing as to the fact whether she were a *feme covert* or not; for that is a collateral fact, to be collected merely by inference from the decree or grant of administration, and was not the point directly tried.³ Where a court of Probate has power to grant letters of guardianship of a lunatic, the grant is conclusive of his insanity at that time, and of his liability, therefore, to be put under guardianship against all persons subsequently dealing directly with the lunatic, instead of dealing as they ought to do with the guardian.⁴

¹ Paplin v. Hawks, 8 N. Hamp., 124; Jarmen on Wills, p. 22, 23, 24; Langdon v. Goddard, 3 Story, 1.

² Newman v. Jenkins, 10 Pick., 515; Moone v. DeBernalis, 1 Russ. 301. The general practice was stated and not denied to be, to admit the letters of administration, as sufficient proof of the death until impeached, but the Master of the Rolls in that case, which was a foreign grant of administration, refused to receive them, but allowed the party to examine witnesses to the fact.

³ Blackham's case, 1 Salk. 290; Hibsham v. Dulleban, 4 Watts, 183.

⁴ Leonard v. Leonard, 14, Pick. 280. But it is not conclusive against his subsequent capacity to make a will. Stone v. Damon, 12 Mass. 488.

SEC. 130. Whenever these courts transcend the limits of their powers their acts will be held void; or if they fail to take the necessary steps for obtaining jurisdiction over the cause or the parties.¹ But when jurisdiction of these courts has once attached and is not exceeded it will not be lost by an irregularity in the mode of exercising it, and every intendment will be made in aid of the regularity of the proceedings which will be regarded as equally conclusive with those courts of superior and general jurisdiction. When the validity of a grant of letters of administration is questioned collaterally the only point open to examination is whether the court had jurisdiction; if that fact is affirmatively established the grant is conclusive. A decree for the sale of a decedent's real estate for the payment of his debts by a court of competent jurisdiction, non-resident heirs having been made parties by publication cannot be impeached collaterally, and where it is sold on a certain day pursuant to a decree of a competent court it cannot be objected to, that the sale took place before the time prescribed by law. When courts having jurisdiction for the sale of an intestate's real estate for the payment of his debts make an order for such sale, no other court can re-examine the order while it remains in force except an appellate court² on proceedings regularly brought in error.³ A decree made upon a deceased guardian's account, the subsequent guardian being made a party to the proceedings, is conclusive and a complete bar to a bill in equity in any other court.⁴ So a decree of a probate court granting to a husband administration with the will annexed on his wife's estate is conclusive of her right to make the will,⁵ and an order for the sale of a decedent's real estate granted by a probate court, if jurisdiction is shown on the face of the proceedings, is conclusive as to the necessity

¹ Jenks v. Howlan, 3 Gray, 536; Gwin v. McCarrolls, 1 S. & M., 354; Enos v. Smith, 7 Id., 85; Babbett v. Doe, 4 Ind.; Peters v. Peters, 8 Cushing, 529.

² Griffith v. Bogert, 18 Howard, 151.

³ Allen v. Lyons, 2 W. C. C. R., 475.

⁴ Blount v. Darrach, 4 W. C. C. 657.

⁵ Cassels v. Vernon, 5 Mason, 352.

and propriety of the sale.¹ A decree settling an account is conclusive and cannot be impeached in an action on a probate bond nor by a bill in equity to compel an account.² In New York they are expressly made so by statute but are impeachable in equity for fraud. In Pennsylvania the conclusive character of decrees settling an account are placed as far above impeachment as the adjudications of any other court. Notwithstanding the conclusiveness of this class of adjudications one fact must be remembered, that evidence may be adduced to show want of jurisdiction;³ as for instance, that the deceased died in a foreign state, the surrogate not having the power so that the letters were of administration *durante absentia* of an executor, or that the grant was revoked, for that is the further act of the same court; or that it was forged, for that shows it not to be the act of the court at all; or that it was granted by a court having no jurisdiction, for then it is a nonentity. But it cannot be shown that the testator was mad or that the will was forged, for these facts might have been alleged in the probate, surrogate or orphans' courts in opposition to the grant of probate or administration⁴ of an executor, or that they are of the estate of a living person, or if there be no jurisdiction of the party for want of notice if that is required, or where the party is not regularly in court as is required by law, or where the land sold lay in a foreign state, or if an attorney or guardian of an infant be necessary and there be none appointed the sale of land is void as to him, or if there was no petition to sell or where they go beyond the statute power of the court, as where the land held in dower was on the death of the tenant distributed to one in preference to another of the next of kin or heirs.⁵ The United States government is not ordinarily bound by an estoppel in a case where an administratrix had distributed her estate

¹ Comstock v. Crawford, 3 Wall, 396. ² Saxton v. Chamberlain, 6 Pick, 422; Field v. Hitchcock, 14 Pick. 405. ³ Elliott v. Pearsal, 1 Pet. 328; Jennison v. Hapgood, 7 Pick. 1; Groff v. Groff, 14 S. & R. 184; Downing's Estate, 5 Watts, 90; The Aurora, 1 Wheat. 96; Goodrich v. Thompson, 4 Day, 215. ⁴ Noel v. Wells, 1 Levinz, 235. ⁵ Bates v. Delevan, 5 Paige, 310; Weston v. Weston, 14 Johns. 428; Griffith Frazier, 8 Cranch, 14. ⁶ Johnson v. U. S., 5 Mason, 425.

and made her final settlement under a decree of a probate court, it protected her from a claim by the United States government,¹ against the estate some years after the settlement. It has also been held that the payment of money to an executor who had obtained probate of a forged will which was afterwards repealed is a discharge to the party paying it.² Since the probate being conclusive evidence of the executorship as long as it remains unrepealed, the debtor would, when he was called upon to pay, have had no defense against the action brought by the executor under the forged will.

SEC. 131. Mr. J. Buller said in *Alter v. Duncans*, 3 T. R., 125, the question naturally rises and to be considered is what is the effect of a probate? It has been contended by counsel, that it is not a judicial act, and secondly that it is not conclusive. But I am most clearly of the opinion that it is a judicial act, for the ecclesiastical court may hear and examine the witnesses on the different sides, whether a will be or be not properly made. That is the only court that can pronounce whether the will is good, and the courts of common law have no jurisdiction over the subject. Secondly, the probate is conclusive till it is repealed, and no court of common law can admit evidence to impeach it. Then this case was compared to a probate of a supposed will of a living person, but in such a case, the ecclesiastical court have no jurisdiction, and their probate can have no effect; their jurisdiction is only to grant probate of the wills of *Dead* persons. The distinction in this respect is this, if they have jurisdiction, their judgment, as long as it stands unrepealed, shall avail in all other places; if they have no jurisdiction, their whole proceedings are a nullity, and inasmuch as "if a testator be circumvented by fraud, the testament loseth its force," and that may be set up in objection to the grant of probate of that part of the will which is effected by the fraud. It was in a highly interesting case, *Allen v. McPherson*, 5 Beav. 469; on appeal before the Lord Chancellor, 1 Phil. 133; and 1st. House of Lords cases, 191, been held

¹ *U. S. v. Prinrose*, Gilp. 58.

² *Allen v. Dundas*, 3 T. R., 125.

that after a will and codicils had in a contested suit, been admitted to proof in the ecclesiastical court, the court of chancery had no jurisdiction either to set aside one of the codicils, for fraud alleged to have been practised upon the testator, or to declare the persons who had been guilty of the fraud, and to have reaped a benefit for themselves by inducing the testator to alter his will in their favor; trustees for the persons they induced the testator to cut off. Their opinion seemed to have been in that case, that independently of the prior determination in the ecclesiastical court, the court of chancery had no jurisdiction in the matter. So a decree or decision in an action in a Probate Court in regard to which of two parties are next of kin, and the court finds that one of them is next of kin and issues letters of administration to that one, the decree will be conclusive evidence of the relationship of the parties in any other court for a distribution of the estate.¹ Another well settled principle of law is that the grant of letters testamentary or of administration, are not notice in foreign states or countries, nor are probate proceedings of states recognized in another with any thing like the degree of conclusiveness that they have in the state from whence they emanate. In fact they have no effect whatever in other states, and an administrator or guardian will not be recognized as a party beyond the territorial jurisdiction of the court from which he derives his powers. He is not even permitted to bring a suit jointly with a domestic administrator,² and in the case of *Dixon's Exr's. v. Ramsay's Exr's.* Chief Justice Marshall stated that it was on these grounds, "all rights to personal property are admitted to be regulated by the laws of the country where the testator lived; but suits for those rights must be governed by the laws of that country in which the tribunal is placed.

SEC. 132. No man can sue in the courts of any country, whatever his rights may be, unless in conformity with the rules prescribed by the laws of that country.³ But there

¹ *Barr v. Jackson*, 1 Y. & C. 21 Eng. Chan. 585; *Thomas v. Ketterinck*, 1 Ves. sr. 333.

² *Dickenson v. McGraw*, 4 Rand. 158.

³ *Trecotthick v. Austin*, 4 Mason, 35; *Story Conflict of Laws*, 431, note 2.

are of course some qualifications to this rule, not in fact denying the validity of the general rights and acts of a foreign executor or administrator arising under the *lex loci*, but only when he goes abroad to act, sue, or be sued, that he is regarded as without power. While his title is complete under his foreign letters, he can bring an action (in another state as the personal representative) for trover,¹ voluntary payments to and receipts by him are conclusive. A recovery by a foreign administrator, is a bar to an action here, by a domestic administrator for the same demand, and there is no distinction between administrators, &c. in the various states and foreign ones; the same rule applies, in both instances. In some of the states administrators and executors are allowed to sue, but where a domestic executor or administrator is appointed he takes precedence over a foreign one; but it is well settled that a probate of one state cannot be received as such to effect the title to land in another. This is on the ground of the *lex loci*,² it is strange that it should be so when the constitution of the United States expressly says full faith and credit shall be given to the records, public acts and judicial proceedings of other states.³ In *Bush v. Sheldon*, a sale of land under a decree of the probate court, for want of personal estate, was held unimpeachable by the heir in an action of ejectment, because he was a party in the probate court, and a decree of a probate court establishing a will is conclusive not only to the personal but to the real estate, the power given to the court being the same in both instances. Independent of the modifications made by the statutes of the various states in regard to the various tribunals of which we are now treating, (and there are in all the states in the union courts created by statute having jurisdiction of the real and personal estate of decedents.) Their decrees are conclusive, and no court can impeach them until they are reversed, or set aside by appellate courts. Such courts being creatures of the statute or special

¹ *Akyns v. Smith*, 2 Atk. 63; *Doolittle v. Lewis*, 7 Johns. 49; *Stevens v. Gaylord*, 11 Mass., 264.

² *McComick v. Sullivant*, 10 Wheat. 192.

³ *Stevens v. Gaylord*, 11 Mass., 264.

enactment, they are treated as inferior courts or courts of limited jurisdiction, and in pleading their decrees, jurisdiction must be shown, and when once shown to have attached, they are effectual and conclusive until annulled on appeal, and cannot be impeached collaterally.¹ In New York it has been held that the recital of the presentation of an account in a surrogate's order is insufficient. The fact of its presentation must be affirmatively shown. So where there are irregularities in granting letters of administration, the court having jurisdiction of the subject matter and person, thereby being fully empowered to act by refusing or granting such letters. A person so appointed becomes the administrator *de facto*; the regularity of his appointment cannot be questioned, in a collateral proceeding it must be held conclusive except in a direct proceeding for reversal.² The execution of an additional bond estops both the principal and surety from controverting the probate court's jurisdiction in any proceeding or action. The sureties have no more right than the principal to deny assets. Because, by their bond, they are bound by the acts of the administrator co-extensively with his liability and cannot deny assets; for the recital in the bond shows that there were assets.

SEC. 133. As to the effect of the decree of a spiritual court in estopping the parties to the suit, with respect to a question incidentally determined therein upon opening up the same question in another court, in a suit having a different object, much discussion arose in the case of *Barrs v. Jackson*.³ In that case the Lord Chancellor Lyndhurst, reversing a decretal order of the Vice Chancellor, held that a judgment of an Ecclesiastical Court, in a suit for *administration* turning upon the question of which of the parties was next in kin to the intestate, to be conclusive upon that question in a subsequent suit in a court of chancery, between the same parties for *distribution*. The judgment was based upon the ground that the House of Lords had decided: that the court

¹ *Brown v. Lanman*, 1 Conn., 467; *McPherson v. Conliff*, 11 S. & R., 422; *Scott v. Hancock*, 13 Mass. 166; 14 S. & R. 181.

² *Wright v. Walbaum*, 39, Ill. 355.

³ 1 *Young & Collyer*, 20 Eng. Chancery, 583.

of chancery, in exercising its concurrent jurisdiction as to distribution, was concluded by judgments of the spiritual courts in granting administration, and not at liberty to re-examine the points decided in their peculiar jurisdiction. The principles laid down in the judgment of the Vice-Chancellor are, however, wholly untouched by the reversal, and that judgment presents a very full and clear statement of the law of estoppel by adjudication in a former suit, considered with reference to the conditions of its operation. The Vice-Chancellor proceeded, after a discussion of the leading English authorities, to state his opinion of the law as derived from those and other authentic sources to be, that "generally a judgment neither of a concurrent or exclusive jurisdiction, is (whether receivable or not receivable) conclusive evidence of any matter which came collaterally in question before it though within the jurisdiction, or of any other matter incidentally cognizable, or of any matter to be inferred by argument from the judgment (after citing numerous cases to illustrate the injustice and absurdity of holding decisions upon facts in proceedings *inter partes* to be conclusive upon the parties for all purposes) his honor proceeded to say: "Lord Ellenborough certainly, and the Court of King's Bench, in *Outram v. Morewood*, decided most accurately, with reference to the pleadings in that action at common law, and that an allegation on record upon which issue has been once taken and found, is between the parties taking, it conclusive, according to the finding thereof, so as to estop them respectively from litigating that fact once so tried and found. The action, however, in *Outram v. Morewood*, raised as to the same property, and for the same purpose, the same issue as was raised and tried in the action, the judgment wherein was pleaded. There are material points of distinction between the system of pleading in the English courts of common law and those of other courts of justice. But it is, I think, to be recollected, that the rule against re-agitating matter adjudicated, is subject generally to this restriction; that however essential the establishment of particular facts may be to the soundness of a judicial decision; however it may proceed on them as established, and however

binding and conclusive the decision may, as to its immediate and direct object be, those facts are not at all necessarily established conclusively between the parties, and that either may again litigate them for any other purpose as to when they may come in question, provided the immediate subject of the decision be not attempted to be withdrawn from its operation, so as to defeat its direct object. This limitation to the rule appears to be consistent with reason and convenience, and not opposed to authority. I am not now referring to the law applicable to certain prize and admiralty questions, which are governed by principles in some respects peculiar. On the whole, I am not prepared at present to say that according to the proper sense of the expression, the judgment of the Ecclesiastical Court between these parties was directly upon the point of the alleged illegitimacy of R. J. S., and had the establishment of that supposed fact for its proper purpose and object, so as to render his illegitimacy *rem judicatum* between the parties on a question of distribution."

SEC. 134. The principles so ably enunciated are not confined to judgments and decrees of spiritual and probate courts, but are of general application to the law of estoppel. The practical results to which the opinion points, have the sanction of additional authority in the cases already referred to, and also in regard to estoppel by matter of writing or deed, and will doubtless be found applicable to every portion of this important subject. There is this difference between orders and decrees made by this class of tribunals, and decrees exclusively *in rem*, while the latter bind the whole world, the former are conclusive only between the parties who claim under or through them, and are not even conclusive upon them unless they have had actual or constructive notice; while the order of a court of Probate, directing the execution of a will is unreversed; no other court can declare the will void, or collaterally examine the correctness of the order or judgment.¹ A decree settling an account is conclusive; it cannot be impeached in an action

¹ Lewis' Heirs v. his Executors, 5. Mill. Lou. 337, 393.

on a probate bond, nor by a bill filed in equity to compel an account. In proving a sale of real estate made under the decree of one of these courts, jurisdiction must be shown, and it makes no difference how erroneous the proceedings may have been; they are conclusive until annulled or reversed on appeal, and they cannot be impeached collaterally.¹ Such proceedings are *in rem* against the estate and not *in personam*, and they bind all those claiming under the testator or intestate, and even divest the lien of a judgment,² and as such they are binding on the land like the condemnation of a court of exchequer or admiralty on goods. In supporting these sales irregularities should be overlooked, purchasers should not be affected by the laches of officers. Their regularity is to be presumed after a lapse of years, and the record saying that the party appeared or other pertinent matter has been held conclusive. Such a decree is like one in chancery on which a sale is had, or a judgment at law or a sheriff's sale. The purchaser is not bound by the matters prior to the decree or judgment, except to jurisdiction and parties. A judgment decree, sentence, or order, passed by a court of competent jurisdiction, which transfers, creates, or changes a title, or any interest in the estate real or personal, or which settles or determines a contested right, or which fixes a duty upon one of the parties litigant, is not only final as to the parties themselves, and all claiming by or under them, but furnishes conclusive evidence to all mankind that the right interest or duty belongs to the party to whom the court adjudged it; it is admissible in favor of any person who may be interested to prove the existence of such right or duty as a fact.³ Probate court proceedings where the courts have jurisdiction, cannot be questioned in a suit in chancery by the wards against the guardian.⁴ So a decree of a probate court

¹ Jenkins v. Robinson, 4 Wend. 436; Jackson v. Crawford, 12 Wend. 533; Moers v. White, 6 John. ch. 381; Brown v. Lanman, 1 Conn.; Bush v. Sheldon, 1 Day, 170; McPherson v. Cunliff, 11 S. & R. 422; Lelin v. Snyder, 7 S. & R. 166; Thompson v. Tolmie, 2 Peters, 157.

² McPherson v. Cunliff, 11 S. & R. 422, 430; 4 Dall. 119.

³ McPherson v. Cunliff, 11 S. & R. 533.

⁴ Lynch v. Rolan, 39 Ill. 15; Watson v. Hutton, 27, Ill. 513.

rendered on a final settlement of an administrator's account cannot be set aside at a subsequent term, on account of matters which go behind it; it is as conclusive until reversed as a decree in chancery or a judgment of any superior court.¹ Nor can their decrees or orders respecting the sale of real estate of a decedent be collaterally assailed when jurisdiction is shown to have attached².

SEC. 135. In the celebrated *Gaines'* case, the United States Supreme Court held that the probate of a will, duly received to probate by a state court of competent jurisdiction, was conclusive of its validity and contents. But a probate of a will in one State or county will not establish its validity as a bequest or devise of lands or chattels in another. But Probate Court proceedings, where the court has jurisdiction, cannot be questioned. But it is a universal and well settled principle of law, that in cases of courts of this kind, that the decrees of such courts are voidable collaterally by showing lack of jurisdiction. Judgments of these tribunals, like other judicial acts, may be impeached by strangers to the suit by evidence of fraud or collusion. But this proposition must always be qualified with the fact that the person seeking to impeach the former was neither party or privy to it. If he stand in either of these relations, he shall not be heard to allege fraud, even in the mode of proceeding by which he is condemned; of course he shall not in the foundation and merits.³ But while third persons may impeach, they are also protected by fraudulent judgments, where they act under them *bona fide*. While judgments of courts that are obtained by fraud, have been considered as absolutely void; all acts performed under them are valid as respects third persons.⁴

SEC. 136. For certain purposes and within certain limits, every sovereignty may, without any violation of principle, exert its authority over the real property, subject to and

¹ *Canan v. Greenwood*, T. P. Co., 1 Conn. 7; *Griffin v. Griffin*, 40 Ala. 296; *Moadwell v. Holmes*, Ibid. 392; *Watt's admis. v. Watts*, Dis. 37, Ala. 546

² *Rivers v. Thompson*, 43, Ala. 633; *Walker v. Mock's admis.* 39, Ib. 568.

³ *Peck v. Woodbridge*, 3 Day, 30.

⁴ *Sims v. Slacum*, 3 Cranch, 306.

within its jurisdiction, by statutes operating *in rem*, which are not limited to the rights of particular persons and thereby estop all the world from controverting the title thus transferred or created by such proceedings.¹ Laws have been enacted by almost every government, rendering adverse possession a bar to every right which is not enforced within a certain period of time. So the appropriation of land for public purposes by virtue of the right of eminent domain, must, as a matter of necessity, divest the title of strangers as well as parties to the proceedings.² No legislature will be presumed to have enacted any law that would permit any man to be deprived of his property without giving him an opportunity to be heard, although there may be provision made for making service by publication when it cannot be made *in personam*. All actions brought for the recovery of title to land are in the nature of proceedings *in rem*, whether commenced by service *in personam* or by publication, yet the judgment is limited to the estate and to those who have been made parties either by service of process or by appearance. And the title of third persons is neither barred nor affected by any order or execution based on such a judgment. The proceedings of Probate, Surrogate, or Orphans' and Guardians' Courts of this country, for the sale of the real estate of an ancestor, for the payment of his debts, or for the purpose of facilitating or effecting a partition or distribution among his heirs, are commonly instituted by petition or publication, without any direct or personal service of process, and are sometimes described as proceedings *in rem*. The order or decree in such cases is binding on all who claim title by descent from the ancestor, whether they are or are not actually before the court when it is made.³ But the difference between them and a real judgment *in rem* is, that the estoppel is limited to the title of those whom the law regards as parties or privies to the proceeding, and will not be binding even on them unless they have had actual or constructive notice in the manner prescribed by statute.

¹ *Jeter v. Hewett*, 22 How. 352.

² *Stewart v. Board, &c.*, 3 Cush. 479.

³ *Clemens v. Clemens*, 37 N. Y. 74.

CHAPTER VI.

JUDGMENTS OF INFERIOR COURTS AND COURTS OF LIMITED JURISDICTION.

SECTION 137. Superior courts are presumed to act by right and not by wrong ; consequently their acts and judgments are conclusive in themselves, unless clearly beyond the jurisdiction of the tribunals from whence they emanate. The jurisdiction of limited and inferior courts must be shown to confer validity upon their acts, and when the facts necessary to give jurisdiction ; are not apparent upon the face of the record, or are not proven *aliunde*, the whole will be void and set aside as a nullity when called in question in any collateral proceeding. The strictness with which the proceedings of inferior tribunals are scrutinized, applies only to the question of jurisdiction, and the existence of jurisdiction, when that is proved or conceded, the maxim *omnia præsumentur rite et solemniter esse acta*, applies as well as to other courts of general jurisdiction. This proceeds upon the principle that estoppels must be mutual ; that nothing that does not bind both parties can be conclusive upon either. When the proceedings of inferior courts set forth facts necessary to give jurisdiction, it will be held to exist without proof *aliunde*. But unless courts of inferior and limited jurisdiction show that the matters in litigation were within the scope of their powers, the presumption is that they were beyond them, and consequently will be treated as *coram non judice*, and therefore void.¹

SEC. 138. The general principle as to the conclusive effect of what has been regularly determined by a competent tribunal, with regard to the same subject matter in controversy and between the same parties and their privies, apply generally to all the courts in England and this country, whether

¹ Rennie v. Tarr, 2 Zabriskie, 356

superior or inferior, whether of record or not of record. There is, however, some difficulty in determining whether particular courts are, or are not, inferior within the meaning of the term as used in the books. In England probably all courts except the King's, at Westminster, the King's Bench, Exchequer, Bankruptcy and chancery courts, are termed inferior courts and treated as such. Chief Justice Marshall¹ said: "all courts from which an appeal lies are inferior courts in relation to the appellate court before which their judgments may be carried; but they are not, therefore, inferior courts in the technical sense of those words. They (the words inferior courts,) apply to courts of special and limited jurisdiction, which are erected on such principles that their judgments taken alone are entirely disregarded, and the proceedings must show their jurisdiction. The courts of the United States are all of limited jurisdiction and their proceedings are erroneous if jurisdiction be not shown upon them. Judgments rendered in such cases may certainly be reversed; but this court is not prepared to say that they are absolute nullities which may be totally disregarded." The limitation of jurisdiction does not necessarily imply inferiority. The circuit, district and territorial courts of the United States are courts of limited, but not inferior jurisdiction. Their judgments are binding until reversed, and cannot be treated as nullities, or set aside collaterally, for a failure to set forth the facts necessary to give jurisdiction and the same rule applies to many of the local courts in the different states. The courts which under the appellations of orphans' courts, courts of probate, surrogate's courts, courts of ordinary, guardians courts, or whatever name may be given by the statute creating them, which are entrusted with the settlement of the personal estate of decedents, and in subordination to this, with the power to sell real estate when the personal estate is insufficient to meet the charge upon it, are treated in some of the states as inferior tribunals, and their decrees held to be voidable collaterally, by showing a want

¹ 2 Kemp's Lessee v. Kennedy, 2 Cranch. 185; Wood v. Mann, 1 Sumn. 578; McCormick v. Sullivant, 10 Wheat. 192.

of jurisdiction either in the cause itself or over the parties.¹ and is applicable with greater force to the acts of such tribunals which are ministerial in their nature as well as judicial; as for example, the grant of letters of administration,² and it was held that the appointment of a guardian by a probate court, without annulling or vacating a prior testamentary appointment by the father of the ward, was *coram non jndice*, and wholly void and might be disregarded in course of subsequent and collateral proceedings.³ Owing to the limited and inferior jurisdiction of these courts there can be no reason assigned why the determinations of such tribunals when they transcend their jurisdiction should not be void, or when they fail to take the necessary steps to obtain jurisdiction over the cause and parties.

SEC. 139. When an inferior court (a court of limited jurisdiction, either in point of place or of subject matter,) assumes to proceed, its judgment must set forth such facts as show that it has jurisdiction, and must show also in what respect it has jurisdiction. But it is another thing to contend that it must set forth all the facts or particulars out of which its jurisdiction arises. Thus if a power of commitment or other power is given to justices of a county, their conviction or order must set forth that they are two such justices of such county, in order that it may be certainly known whether they constitute the tribunal upon which the statute they assume to act under, has conferred the authority to make that order or pronounce that conviction. But although it is necessary that the jurisdiction of the inferior court should appear, yet there is no particular form in which it should be made to appear. The court above which has to examine, and may control the inferior court, must be enabled some how or other, to see that there is jurisdiction such as will support the proceeding, but in what way it shall so see

¹ Chase v. Hathaway, 14 Mass. 222; Conkey v. Kingman, 24 Pick. 115; Wattles v. Hyde, 9 Conn.; Hendrick v. Cleveland, 2 Vt. 377; White v. Riggs, 27 Maine, 114; Erwin v. Lowry, 5 Ala. 117.

² Holyoke v. Hoskins, 5 Pick. 20; Sigourney v. Sibley, 21 Pick. 101; Creave v. Brust 3 Dana, 129; Johnson v. Corpenning, 4 Ired Eq. 216; Flin v. Chase, 2 Denio, 85.

³ Holmes v. Fields, 12 Ill. 424.

it is not material, provided it does so see it.¹ The rule, therefore, may be stated to be, that, where it appears upon the face of the proceeding that the inferior court has jurisdiction, it will be intended that the proceedings are regular ;² but that—unless it so appears—that is if it appear affirmatively that the inferior court has no jurisdiction, or, if it be left in doubt, whether it has jurisdiction or not—no such intendment will be made.³ “The old rule for jurisdiction is, that nothing shall be intended to be out of the jurisdiction of the *Superior court* but that which specially appear to be so ; nothing is intended to be within the jurisdiction of an *inferior court* but that which is expressly alleged.” And again, “it is necessary for a party who relies upon the decision of an inferior tribunal, to show that the proceedings are within the jurisdiction of the court.”

SEC. 140. The Probate courts and courts of like nature, in their jurisdiction are like those of Superior courts. They possess exclusive original jurisdiction in Probate matters, and the care of the estate of deceased persons, and it is provided by the statutes creating such courts, their orders, entries, etc., made on the record of the courts, shall have the full force and effect of judgments. The courts being restricted to this particular branch of business it in no wise makes them inferior courts, limited and subordinate in their jurisdiction. The jurisdiction of these courts is so exclusive and important, that the same rule of construction is to be made in favor of their jurisdiction as is applied to courts of general jurisdiction. Jurisdiction having once attached, it will not be lost by any irregularity in the mode of exercising that jurisdiction. Every intendment will be made in aid of the validity of the proceedings under such jurisdiction, which will be regarded as equally conclusive with that of courts of superior and general jurisdiction. Their judgments cannot be impeached collaterally for mere errors or irregularities unless it amounts to want of jurisdiction, and can only be inquired into by the regular mode of examination which are provided for the

¹ Taylor v. Clemson, 11 Cl. & Fin. 610 ; Reg. v. Ardsley, 5 Q. B. 78.

² Barnes v. Keane, 15 Q. B. 75 ; Baker v. Cave, 1 H. & N. 674.

³ Dempster v. Purnell, 4 Scott, N. R. 39 ; Barnes v. Keane, 15 Q. B. 84.

investigation of real or imputed errors in judicial proceedings; their force and effect cannot be impeached by parol testimony. The only question that can arise when the validity of a grant of letters testamentary or administration is drawn in question in collateral proceedings, is that of jurisdiction, if that is established no exceptions can be taken to the manner in, or to the ground upon which it is to be enforced.¹ In Vermont and Pennsylvania the judgments of Justices of the Peace stand on the same footing as courts of record, while in New York they were held to be conclusive of every matter that might have been litigated.²

SEC. 141. The general sessions of Justices of the Peace in New York are inferior courts. The surrogate's courts also,³ and those who rely upon their acts or decrees are required to show that the circumstances was such as to give them jurisdiction. Where a court of general jurisdiction has special authority conferred upon it by statute it is *quoad hoc*, an inferior or limited court.⁴ In England, as well as in the various states in this country where the jurisdiction of Justices of the Peace is held to be not only limited but inferior, their proceedings are void, and they, themselves liable as trespassers, not only when they act without, but when they exceed their authority,⁵ but when they attempt to exercise their unquestioned and admitted powers, without pursuing the mode, or in any other, than the manner prescribed by law,⁶ and unless they set forth enough to show that the cause was actually within their jurisdiction as that from its general nature it might have been.⁷ This applies equally in pleading as in evidence and a plea which relies on the judgment of a Justice of the Peace as a justification, must not only show that it was within his jurisdiction, but that all the necessary steps to make that jurisdiction effectual were taken.⁸ When juris-

¹ Gay v. Monroe, 12 Wend. 272; Peck v. Randall, 1 Johns. 179.

² Gates v. Preston, 41 N. Y.

³ Dakin v. Hudson, 6 Cow. 221; Sherman v. Ballou, 8 Cow. 304.

⁴ Thatcher v. Powell, 6 Wheat. 114.

⁵ Fisher v. McGeir, 1 Gray, 1; Barker v. Stetson, 7 Gray, 53.

⁶ Snyder v. Wise, 10 Penn. 157; Selby v. Bowen, 3 Chand. 183; Levi v. Moylan, 10 C.B. 189; Bridge v. Frost, 4 Mass. 641.

⁷ State v. Magrath, 31 Maine, 469; State v. Hartwell, 35 Maine, 1129.

⁸ Turner v. Roby, 3 N. Y. 143.

diction is once shown, the presumption is that all matters were rightly done. So where a plea that a defendant has been discharged as a bankrupt or insolvent when jurisdiction is shown all that is necessary is to introduce the final order or decree without proving all the intermediate steps.¹ There seems to be no distinction in this particular between inferior courts and those of general jurisdiction; a judgment of an inferior court acting within the scope of its legitimate authority, with a due observance of all the prescribed modes of proceedings, is equally conclusive, not only against further litigation of the same matter, but in all respects as the judgments of other courts.² The proceedings of any court may be inquired into in any court where the former proceedings are brought by the party claiming the benefit of them.³

SEC. 142. The acts of inferior courts are not valid and conclusive unless *prima facie* within their jurisdiction, while the acts of superior courts are void when manifestly beyond it. The generality of the above principle in regard to inferior courts, unless jurisdiction is apparent on the record, is applicable whether the judgment is for the plaintiff or defendant; and it has been held, in a case in Pennsylvania, that where the defendant recovered a verdict for five dollars and costs, on account of the absence of the plaintiff, that it was no bar to another action, as the former verdict was equivalent only to a non-suit. Every one who brings an action is liable for the costs whether the court had or had no jurisdiction even if no benefit could be derived from a judgment were one rendered. Yet a party is not estopped from averring want of jurisdiction as a reason why he should not be bound by an adverse judgment on the merits of the question, nor from requiring the existence of jurisdiction in any subsequent proceeding in which the judgment is pleaded or given in evidence.⁴ Whenever facts appear which give jurisdiction, they may be disproved, and the proceedings avoided

¹ Brown v. Foster, 6 R. I. 564; Rowan v. Holcomb, 16 Ohio, 463; Hill v. Mitson, 8 Exch. 750; Roosevelt v. Kelly, 20 Johns. 208.

² Blount v. Darrach, 4 Wash. C. C. 659; Groff v. Groff, 14 S. & R. 184; Overseers v. Supervisors, 14 Wend. 71; Yard v. Crammond, 5 Rawle, 18.

³ Chemung Canal Bank v. Judson, 6 N. Y. 254.

⁴ Reading v. Price, 3 J. J. Marshal, 61; State v. Barker, 25 Conn., 439.

by parol evidence.¹ But this is only applicable to those facts and averments on which the jurisdiction of the court depends, for as to all else the records of inferior as well as superior courts import absolute verity, and cannot be controverted.

SEC. 143. All courts are limited to certain subjects of cognizance. Some to actions and prosecutions, civil and criminal, and to appellate and supervisory proceedings; some to only one of the branches, as to criminal matters, civil actions, or to certain particulars of each; some to matters in equity, or of an admiralty or military nature; and others to few matters of small consequence. Richardson, J.,² in a case reviewing many authorities on the question relating to limited jurisdiction and inferior courts, said: "It is true that courts of limited jurisdiction are like particular agents; we must see their authority before we regard their decisions as lawful; but seeing it, we are to respect it, and their authority is not the less certain because specified and confined. The Supreme Court of the United States is one of particular and limited jurisdiction; and yet though bound down by the Constitution to powers strictly delegated—although very confined in its objects—how sovereign and unrestrained is that court within its limits. It is even so with every court of particular and limited jurisdiction, and we require to see evidence of its authority, as much in the instance of the Supreme Court of the United States as in any other. The difference between these and courts of common law and general jurisdiction is, that the latter, as a general rule, have their judicial authority proven, *prima facie*, by the judicial act itself, which is *ipso facto* binding, until it appears negatively that the court has not the power. This is, indeed, no more, in principle, than the distinction between all general and particular agents. The constitution affords an example of each. The general powers of the state legislature afford a striking illustration. Its legislative acts are *ipso facto* binding, unless we can find in the

¹ Walker v. Mosely, 5 Denio, 102; Deming v. Corwin, 11 Wend., 618; Borden v. Fitch, 15 Johns, 121.

² McKenzie v. Ramsey, 1 Bailey, (S. C.) 457.

constitution a direct negative and unavoidable estoppel. And why is this the case? Because it has the legislative power, with only a few particular restrictions, at the same time another great department of the government, the executive, created, too, by the constitution, is no more than a particular agent, under a delegation of limited powers, to which the governor must always look before he acts, not to see if the executive power has been taken away, but if any power has been given him in this particular case to enable him to act at all. And why these distinctions between these great departments? Because the framers of the constitution saw fit to delegate to the executive particular powers only, and not general powers with restrictions. It is the same with all courts of limited and particular jurisdiction. They are strictly confined to the powers given; but we are not, therefore, to seek to curtail their powers. Such courts must not assume constructive powers, (that is,) powers not literally given, or not necessarily consequent upon those so given.

SEC. 144. In a question as to the validity of a decree of a county court, authorizing the sale of the land of a deceased debtor by his administrator, it was laid down¹ as the law, that where a decree is an adjudication upon all the facts necessary to give jurisdiction, whether they existed or not, is immaterial if no appeal is taken; the rule is the same whether the law gives an appeal or not; if none is given from the final decree, it is conclusive on all whom it concerns. The record is absolute verity, to contradict which there can be no averment or evidence; the court having the power to make the decree, it can be impeached only by fraud in the party who obtains it. A purchaser under it is not bound to look beyond the decree; if there is error in it of the most palpable kind; if the court which rendered it have, in the exercise of jurisdiction, disregarded, misconstrued, or disobeyed the plain provisions of the law which gave them the power to hear and determine the case before them, the title of the purchaser is as much protected as if the adjudication would stand the test of a writ of error; so where an appeal is given but not taken in the time prescribed

¹ Grignon v. Astor, 2 Howard, 319.

by law. These principles are well settled as to all courts of record which have an original general jurisdiction over any particular subjects ; they are not courts of special or limited jurisdiction ; they are not inferior courts in the technical sense of the term, because an appeal lies from their decisions. That applies to courts of special and limited jurisdiction, which are created on such principles that their judgments taken alone are entirely disregarded, and the proceedings must show their jurisdiction. They have power to render final judgments and decrees which bind the persons and things before them conclusively, in criminal as well as in civil causes, unless reviewed on error or on appeal. The true line between courts whose decisions are conclusive, if not removed to an appellate court, and those whose proceedings are nullities if their jurisdiction does not appear upon their face, is this : a court which is competent by its constitution to decide upon its own jurisdiction, and to exercise it to a final judgment, without setting forth in their proceedings the facts and evidence on which it is rendered, and whose record is absolute verity, not to be impugned by averment or proof to the contrary, is of the first description ; there can be no judicial inspection behind the judgment, save by appellate power. A court which is so constituted that its judgment can be looked at through the facts and evidence which are necessary to sustain it ; whose decision is not evidence of itself to show jurisdiction and its lawful exercise, is of the latter description. Every requisite for either must appear on the face of their proceedings, or they are nullities. In the case of *Cox v. Thomas*, 9 Grattan. (Virginia Rep.) in delivering the opinion of the court, the judge said : "The only question would seem to be, whether the subject matter was within the jurisdiction of the court ; if it was, if the jurisdiction of the court extended over that class of cases, it was the province of the court to determine for itself whether the particular case was one within its jurisdiction. The Circuit Court is a court of general jurisdiction, taking cognizance of all actions at law between individuals, with authority to pronounce judgments and issue executions for their enforcement. This jurisdiction need not appear

on the face of the proceedings, as in the case of courts of limited and restricted jurisdiction ; where its jurisdiction is questioned, it must decide the question itself ; nor is it bound to set forth on the record the facts upon which its jurisdiction depends.

SEC. 145. Whenever the subject matter of the controversy is an action at law between individuals, the jurisdiction is presumed from the fact that it has pronounced judgment, and the correctness of that judgment cannot be inquired into only by some appellate tribunal. The execution which would issue on the judgment in the case under consideration, would not disclose to the officer the nature of the proceedings upon which the judgment was founded. There was no necessity to set forth in the judgment on what evidence it was rendered ; and being a judgment for a pecuniary recovery, which the court had general jurisdiction to render, the sheriff would have been bound to execute it, and the execution would have been his justification." Then citing the decision in the case of *Grignon v. Astor supra*, he said "of that description is the Circuit Court of Virginia, and its decision in controversies at law is evidence of itself to show jurisdiction and its lawful exercise. The subject being within the jurisdiction of the court it is immaterial by what form it is exercised ; they do not affect the jurisdiction of the court. Thus it is said in the case of the *Marshalsea*, if the court of common pleas hold plea in an appeal of death and the defendant is attained it is *coram non judice*. But if the same court in a plea of debt award a *capias* against a duke which by law does not lie against him and that appear in the writ itself, yet as the court has jurisdiction of the cause the sheriff arresting by force of this writ is excused. So also if the court of common pleas hold plea in debt without original jurisdiction it is not void, for they are judges of those pleas and it cannot be said the proceeding is *coram non judice*. So here the judges of the circuit court are judges of pleas against sheriffs whether carried on by action at common law or by notice under the statute, though in a given case they may err in determining on their jurisdiction. In the case of *Prigg*

v. Adams, 2 Salk. R., 674, in an action for false imprisonment the officer justified under a *ca. sa.* on a judgment of the court of common pleas upon a verdict of five shillings upon a cause of action arising in Bristol. The plaintiff replied, an act of Parliament creating a court in Bristol, and declaring that if any person brought any such action in any court at Westminster, and it appeared on trial to be under forty shillings no judgment should be entered upon it, and if entered it should be void, yet the court held it only voidable and sustained the plea. The principle of that case is decisive of this. There although the act of Parliament declared the judgment void, yet as a court having jurisdiction of the subject matter had rendered it, though the error appeared on its face, it could be corrected only in an appellate tribunal. The case of *Prigg v. Adams*, is cited and relied on in *Fisher v. Tucker*, 9 Leigh. 119, and the same principle was asserted in that case, the court holding that as the general court had jurisdiction to grant letters of administration, although the state of facts was not such as to give the court jurisdiction to grant administration in that particular case yet the grant was not void but only a voidable act. The justice of this doctrine and its advantages in giving certainty and conclusiveness to judicial determinations of tribunals must, from the reasoning in the two decisions herein quoted, be clearly apparent. There is nothing absurd or inconsistent in holding that tribunals of limited jurisdiction shall determine whether matters brought before it are within the exercise of its powers.

SEC. 146. There are but few older principles of law that are well settled and established or that are supported by a greater weight of authority and reason than that which holds that the proceedings of superior courts must be presumed to be correct unless manifestly erroneous, and cannot be controverted or convicted of error by extrinsic evidence, so that even when a judgment is obtained by fraud the only remedy open to the injured party is by bill in equity or an application to the court by which it was rendered.¹ A stranger whose interest are prejudiced may however prove

¹ *Clark v. McComman*, 7 W. & S. 469; *Brown v. Trulock*, 4 Black. Ind. 429.

that the judgment was the result of fraud and collusion between the parties.¹ This principle is applicable in every instance within the authority of a court which decides without regard to the nature or mode of decision,² whether the suit be *in rem* or *in personam* or be like a foreign attachment or mixed proceeding, although when the service is solely upon lands or chattels the estoppel is ordinarily limited to the attached property, and does not bind the defendant personally, unless personally served with process.³ But whenever a judgment is rendered without authority or jurisdiction, or what is virtually the same thing, which is in excess of and lies beyond the general jurisdiction which renders it, it is *coram non judice* and necessarily void, and may be shown to be so in the course of any subsequent or collateral proceeding, want of jurisdiction renders the judgment of a court a nullity and unavailable for any purpose. This applies to superior as well as inferior tribunals, but if the facts conferring jurisdiction have been litigated and passed upon by the court, the regularity of the proceedings will not be enquired into collaterally.⁴ If the party defendant is not brought into court, nor in any manner served with process, there can be no valid judgment against him, and no record unless he appeared by attorney in the cause.

SEC. 147. The proceedings of inferior as well as superior courts may be assailed in various ways for want of jurisdiction. When the question is raised in one form they may be held valid, whereas in another they may be held void or voidable; valid to protect a person acting under them while unreversed to secure him a right or fix his title. They may serve him as a defence to an action while they would be inefficient by way of securing a claim under them. They may protect some persons acting under them and be void as to others. They are most generally assailable on a writ of error or appeal. All jurisdictions are limited to persons,

¹ Parkhurst v. Sumner, 23 Vt.; Downs v. Fuller, 2 Met. 135.

² Ennis v. Smith, 14 Howard 401; Fermor's case, 3 Coke 777.

³ Voorhes v. Bank of U. S., 10 Peters, 449; McCarthy v. Marsh, 5 N. Y. 263.

⁴ Dyckman v. The Mayor, 5 N. Y. 434.

place and things. The court must have jurisdiction of the process, and this is peculiarly applicable to all inferior jurisdictions.

SEC. 148. While superior courts are not limited in their powers nor prevented from rendering final and conclusive judgments in regard to the determination of controversies within reach of their powers, and unless essentially and manifestly beyond them. The rule is essentially different in regard to courts of limited and inferior jurisdictions. Their judgments and decrees are final only to matters within their jurisdiction, and are final on the question of jurisdiction only so far as the question of jurisdiction is involved in the merits of the matter in litigation and determined, and a recital in the record and proceedings of such a tribunal, if the necessary facts to give them jurisdiction is *prima facie* evidence, but extrinsic and parol evidence may be used to rebut that presumption. Thus where an attachment was levied upon certain goods and judgment rendered, Justice Miller in 5 Wallace decided, that a party could at any time show that the goods were not liable to attachment and were beyond the jurisdiction of the court notwithstanding the record stated that they were; but this rule is applicable only to those facts and averments on which the jurisdiction of the court depends; as to all else, if jurisdiction is shown, the records import absolute verity and cannot be contradicted. When the powers of an inferior court are limited to causes of action arising within a particular locality, or relating to property of a specific nature; the judgments and adjudications of such tribunals may be set aside subsequently, by proof that they have exceeded their limits, no matter how conclusive their determinations may be in other matters,¹ and the same rule applies to courts whose jurisdiction is confined to one class of persons when they attempt to exercise over another. The law was said to be² 1st, That where a judicial tribunal has general jurisdiction of the subject matter in controversy or investigation, and the special facts which give

¹ Williams v. Wheeler, 28 Barb. 669; Hamott v. Van Cott, 5 Hill; Borie v. Miller, 40 Barb. 661.

² Bumstead v. Bumstead. H. & N. 219, 240.

it the right to act in a particular case, are averred, and not controverted, upon notice to all proper parties, jurisdiction is acquired, and cannot be assailed in any collateral proceedings. 2d. Where the judicial tribunal has not general jurisdiction of the subject matter under any circumstances, no averment can supply the defect, no amount of proof can alter the case, no consent can confer jurisdiction. But where the judicial tribunal has not general jurisdiction of the subject matter, but may exercise it under a particular state of facts, these facts must be specially averred and established, and when so established on a hearing of all proper parties, cannot be impeached in any collateral proceedings.¹ When a superior or inferior court has jurisdiction over the cause, its judgment cannot be set aside by proof that the proper steps were not taken to render it binding upon the parties, by the service of process or publication, if it appear that the question, whether the writ was duly served or published, was considered and decided when the judgment was rendered, although on insufficient evidence, and without actual notice to the party whose rights were affected by the decision. Whenever, therefore, the question of jurisdiction is one of fact and is decided by the court whose proceedings are in question, the decision will be final, whether the question arise on a writ of error or in a collateral action.² As we have seen, the effect of a judgment of superior court acting within the scope of its powers, it must be understood that when they exercise a special or statutory authority, their proceedings stand on the same footing with those of courts of limited and inferior jurisdiction and are null and void unless they strictly pursue the authority on which they are founded. "In exercising powers which do not belong to a court of general jurisdiction, the extent of the authority, the conditions of its exercise, depends on the nature of it, the terms in which it is conferred, and not on the rank and position of the persons by whom it is to be exercised. A limited power will be not less strictly construed because those with

¹ *Sheldon v. Wright*, 5 N. Y. 497.

² *Riley v. Waugh*, 8 Cushing. 220; *R. R. Co. v. Evansville*, 15 Ind. 395; *Cooper v. Underland*, 3 Iowa, 114; *Vale v. Owen*, 19 Barbour, 22.

whom it is bestowed are intrusted with other and more general powers."¹ When a court of general jurisdiction has special and summary powers wholly derived from statute, and not according to the course of the common-law, and which do not belong to it as a court of general jurisdiction, its judgments are regarded and treated like those of courts of limited and inferior jurisdiction, and everything necessary to give jurisdiction must appear by the record; everything will be presumed to be beyond the jurisdiction which the record does not show to be within it.

SEC. 149. Judgments of these courts, like other judicial acts, may be impeached by strangers to the suit by evidence of fraud or collusion. But with this qualification that the person seeking to impeach the former judgment or decree was neither party or privy to it. If he stand in either of these relations, he shall not be allowed or heard to allege fraud even in the mode of proceeding by which he is condemned; of course he shall not in the foundation and merits.² The right to impeach judgments or decrees, is generally confined to third persons who are strangers. A judgment on a demand allowed cannot be collaterally brought into question. No objection can be taken to it unless the want of jurisdiction appears on the face of the proceeding; its allowance unless appealed from is like a judgment *res adjudicata*, and such judgment cannot be questioned for error or irregularity. In Rhode Island the probate of a will by the proper probate court of the State, is conclusive upon the question of the validity of a will to pass real estate. In Massachussetts it has been repeatedly held that if a court of Probate assumes a power which has not been conferred upon it, or departs from the course prescribed by law in exercising the powers conferred upon it, its decree will not only be erroneous, but wholly destitute of validity and may be treated as a nullity in any collateral proceeding in which the question arises,³ and this seems to be the well settled rule in all the States.

¹ Striker v. Kelly, 7 Hill, 11.

² Peck v. Woodbridge, 3 Day. 30; Townsend v. Kern, 2 Watts, 180.

³ Jenks v. Howland, 3 Gray, 536; Peters v. Peters, 8 Cush. 529.

SEC. 150. Where courts of law and equity have concurrent power, the court first applied to grants the relief which concludes against the second suit, and this is the rule with all tribunals of concurrent jurisdiction. A party will not be aided by a court of chancery after a trial at law, unless he can impeach the justice of the verdict on grounds of which he could not have availed himself at law, or unless he was prevented from doing so by fraud or accident, or the act of the opposite party, unmixed with negligence or fault on his part.

SEC. 151. A decree in a court of chancery may be given in evidence, and upon the same basis as the judgment of a court of common law. An existing judgment, or decree of a competent court is conclusive of the rights of parties on the same point, in any other court of concurrent jurisdiction; nor do the decrees of a court of equity form any exception to the rule. A decree on a bill filed, alleging payment of a note declaring that facts alleged in the bill as amounting to payment were not true, was held to be conclusive against evidence of the same facts, offered to show payment in a suit at law on the same note.¹ A general dismissal of a bill may be pleaded in bar to a subsequent bill for relief on the same subject matter.² For the reason that a dismissal of a bill in chancery stands nearly on the same footing as a judgment for the defendant in an action at law, the presumption is that it was a final and conclusive adjudication upon the merits, whether they were or were not determined, unless the decree of the court proves that they were not determined, or that fact is apparent on the face of the decree.³ Mere dismissal, however, without prejudice, is no bar, nor will a decision on summary application which goes off for want of notice or some other informality, bar a renewed application in proper form.⁴ Mere dismissal for want of prosecution is no more than a nonsuit at law, and therefore con-

¹ Coit v. Tracy, 8 Conn., 268.

² Holmes v. Remsen, 7 John. Ch. 286; Danahower v. Prentiss, 22 Wis. 311.

³ Black v. Black, 27 Geo. 40; Hall v. Dodge, 28 N.H. 346; Kelsey v. Murphy, 26 Penn. St. 78.

⁴ Blight v. McIlvoy, 2 Monroe, 142.

cludes nothing against the party or his privy.¹ The common law rule, in respect to judgments, is equally applicable to decrees in chancery, that the order or decree is not evidence against strangers, but is confined in its operations to parties and privies. The decree and proceedings in chancery are equally admissible as a record at law to show *rem ipsam* though between strangers, and especially between privies. The regularity or error of the proceedings in the court of chancery whether the matter was previously heard, is not the subject of inquiry,² nor is it impeachable for fraud while in force.³ But jurisdiction is enquirable into, so that a decree may be good *in rem* as to a non-resident without notice, and void as to another part *in personam*. "By the *lex loci rei sitae* property belonging to a person who is not within the jurisdiction of a court of law or equity, may be made subject to the jurisdiction of the court so as to render the judgment or decree of such court, binding as a proceeding *in rem* against the property within its jurisdiction. But where the defendant or any party proceeded against does not reside in the State or county where the suit is brought and is not served with process and does not appear, the judgment or decree in such suit will not be allowed to operate *in personam* against such party in the courts of any other State, and in general the same principles are applicable to decrees in chancery as apply to all judgments of court of law, a decree in chancery between the same parties proceeding upon the same substantial facts and grounds of equity is conclusive,⁴ and is a good plea in bar, and when given in evidence constitutes an estoppel in a subsequent suit.⁵ So a decree dismissing a bill in any U. S. court is absolute, and constitutes a bar to any further litigation between the same parties upon the same subject matter, unless made, because of some defect in the pleadings or for want of jurisdiction, or because the complainant has an adequate

¹ Ball's Lessee v. Ball, 2 Fox and Smith, 249.

² Bates v. Delavan, 5 Paige, 299.

³ Peek v. Woodbridge, 3 Day, 30.

⁴ Maguire v. Taylor, 40 Mo. 406; French v. French, 8 Ohio, 214; Parish v. Ferris, 2 Black. 606; 2d Story Eq. § 1523.

⁵ Story v. Lee, 45 Ill. 277.

remedy at law or upon any other grounds which do not go to the merits, is a final determination. But where words of qualification are used, such as "without prejudice" or other terms indicative of a right or privilege to take further legal proceedings on the subject do not accompany the decree. The presumption is that it was dismissed on the merits.¹

SEC. 152. An injunction in chancery, or a decree determining that one of the parties is entitled to a conveyance of the subject matter in controversy from the other, cannot be pleaded or given in evidence as an estoppel, on the principle that to render a decision by one court conclusive against the right to seek redress in another, the matter involved must be substantially the same, which is not the case unless the jurisdiction of the former tribunal was sufficiently extensive to cover the whole ground brought before the latter. An adjudication on legal grounds in a court of law, will not necessarily preclude a re-examination of the subject in equity, and relief may be sought in an equitable proceeding against a judgment obtained by fraud, of such a nature that it could not have been set up as a defense to the action in which the judgment was obtained. When, however, a question falls within the exclusive or concurrent jurisdiction of equity, the decision will be conclusive in pleading and evidence at law. A judgment against trustees or assignees who have sued for property embraced in the assignment, is binding upon the trustees and creditors, unless it can be shown to have been the result of fraud and collusion, when it may be set aside and canceled in equity. It is not every fraud which will be regarded as grounds for avoiding the judgment, and when collusion is charged it must be satisfactorily proven before the court will interfere to afford relief.² The mere concealment of facts by either party to the suit, which might be beneficial to the other, has not been regarded as fraud. For the repose of society, the ending of litigation and the security of titles to property, it is rendered imperative and necessary that stability should be given to the solemn adjudica-

¹ Hughes v. U. S., 4 Wall. 237; Walden v. Bodly, 14 Pet. 156; Bigelow v. Winsor, 1 Gray, 301; Foote v. Gibbs, Ib. 242.

² Field v. Flanders, 40 Ill. 470.

tions of courts of justice. The law does not require parties to disclose facts in their knowledge beneficial to the other parties, unless required to discover by a bill, and such failure to do so is not of itself sufficient ground upon which to invoke the aid of a court of equity.¹

SEC. 153. A party to a bill in equity is estopped by the decree, as to matters put in issue by the pleadings and settled by the decree.² When a fact has been directly tried and decided by a court of competent jurisdiction, it cannot be contested again between the same parties or their privies, in the same or any other court. A judgment of a court of law or decree in chancery, is an estoppel to the parties thereto and their privies, provided it relates to the same subject matter, and decides the questions now in issue. But if that question was before the court only collaterally, and incidentally considered, the judgment or decree is no estoppel. It cannot be ascertained by inference, or by arguing from the former judgment or decree, whether the question now in issue was embraced therein.³ Parties to a suit in a court of competent jurisdiction where they labor under no disability are bound by the determination of their rights if fairly before the tribunal; when they have been once adjudicated in a court having jurisdiction they cannot be again litigated. The object in making a person a party to a suit is to enable him to be heard and to assert his rights, if he fails to set them up that he may be concluded from again litigating them, as for instance: in a proceeding for partition by heirs, the widow was made a party; the petition alleged that she was entitled to dower, and the court adjudged it to her, commissioners were appointed to assign dower; they reported it could not be done and the court therefore decreed her a yearly allowance in lieu of dower and made it a lien upon the land. The lands were sold under the partition proceedings, subject to the payment of the annuity. The widow made no claim of homestead, and she was estopped from afterwards setting up a homestead right against the purchaser under the partition

¹ Cary v. Miner, 42 Ill. 179.

² Carr v. Emory College, 32 Geo. 190.

³ Evans v. Burge, 11 Geo. 265.

sale. Where an unmarried woman, the head of a family, capable of releasing the homestead, and occupying it fails to assert her right, when a court is called upon to pass upon it, in a suit to which she is a party she will be concluded. Where a person, not under a disability is sued and the homestead is involved, it will be affected by any neglect to assert it precisely as any other right.¹

SEC. 154. The conclusiveness of judgments of inferior courts in regard to matters of Probate and partition, was stated to be under the New York Statutes;² that an actual partition or sale, under a judgment in partition is effectual to bar the future contingent interests of persons not *in esse*, though notice is published to bring in unknown parties, and though such future purchasers may take under a deed or will, and not as claimants to any party to the action, "and also independent of the statute; contingent remaindermen or persons taking under an executory devise, who may thereafter come into being, are bound by the judgment as being virtually represented by the parties to the action, in whom the present estate is vested." "A final judgment was entered whereby it was adjudged and decreed, that the report of the commissioners in partition, and all things therein contained be ratified and confirmed; that the partition so made by the commissioners shall be final and absolute." "It is difficult to perceive any substantial reason, why this adjudication of the rights of all parties, should not be final and conclusive? In *Blakely v. Culder*, (15 N. Y., 617,) the court held, that a judgment in partition is binding upon the parties if the court had jurisdiction," of them and the subject matter. Matters which have been once determined by judicial authority cannot be again drawn into controversy as between the parties and their privies. A decree, with regard to the personal status of an individual, will be equally conclusive with a decision upon a right of property; and hence the removal or appointment of an administrator or guardian, or the adjudication on a question of descent or pedigree, will be binding not only in the pro-

¹ *Wright v. Dunning*, 46 Ill. 271.

² *Clemens v. Clemens*, 37 N. Y. 74.

ceedings where they take place but in every other in which the same matter is agitated; and it is equally well settled that it is immaterial in what manner the question is brought before the court if it be actually decided." "It is not essential to create an estoppel that matters should have been adjudicated in precise terms. It is sufficient of the substance was so decided. The estoppel extends beyond what appears on the face of the judgment to every allegation which was made on one side and denied on the other, and was at issue and determined in the course of the proceedings." The burden of proof is of course on those who rely on the estoppel, and they must show that the matter in controversy has already "been heard and determined, when however it has been made to appear with sufficient clearness that a transaction has undergone a judicial investigation, the presumption will be irresistible that the judgment covered the whole, so far as it was entire and indivisible; and cannot be overcome except by the clearest proof that no evidence was given as to that fact by the plaintiff, or that the defendant failed to take advantage of a defense that might have been made available."¹ "The general rule on the subject, is well-known to be that a former judgment of the same court or a court of competent jurisdiction, directly upon the point in issue, is as a *plea* in bar, or as evidence conclusive between the same parties, or others claiming under them upon the same matter directly in question in a subsequent action or proceeding. Such judgment or determination is final and conclusive, not only as to the matter actually determined, but as to every other matter which the parties might have been litigating, and have had decided as incident to or essentially connected with the same subject matter of the litigation, and every matter coming within the legitimate purview of the original action both in respect to matters of claim and defense."² This court said

¹ *Bellows v. Forsyth*, 2 How. 183; *Harris v. Harris*, 36 Barb. 88; *Sims v. Lezane*, 48 Penn.; *Kilheoffer v. Herr*, 17 S. & R. 319.

² *Harris v. Harris*, 36 Barb. 88; *Bruen v. Hone*, 2 Id. 586; *Emberry v. Connor*, 3 N. Y. 511; *Hare v. Baker*, 5 N. Y. 351; *Davis v. Talbot*, 12 N. Y. 184; *Hays v. Rees*, 34 Barb. 156; *Clemens v. Clemens*, 37 N. Y. 74.

that an allegation on record, upon which issue had been once taken and found and a judgment has been rendered is between the parties taking it and their privies, conclusive according to the finding thereof, so as to estop the parties respectively, from again litigating that fact once so tried and found, whether plead in bar or given in evidence." "It follows that the judgment of a court of competent jurisdiction in a suit in which all the parties interested in the subject matter of the litigation being parties to the suit and their rights are declared, was *res adjudicata*." ¹ The same court decided ² that where a plaintiff had in a former action recovered damages for injuries to his land caused by flooding the same, the same causes continuing and the same damages to the plaintiff as a result, "in a subsequent action the accruing defendant will be estopped from denying damages as a result from the continuing cause of such damage as a matter of law; a former recovery for injuries sustained by the same plaintiff from the same cause, establishes the right to recover damages subsequently sustained from the same cause; but this was on the ground that the plaintiff could not recover prospective damages.

SEC. 155. As has been repeatedly stated, the verdict and judgment in any case is admissible to prove the fact that the judgment was rendered on the verdict given. There is a vast difference between proving the existence and its effect, and using a record as a means of proving any fact recited in it. In regard to proving the existence of a judgment or decree, it is never regarded as *res inter alios acta*, it being a public transaction rendered by public authority. The presumption is that it is faithfully and truly recorded, and this presumption is so conclusive, that the only proper and legal manner in which its own existence can be substantiated and the legal consequences resulting from its rendition can be shown is by its being produced in any tribunal where it is attempted to be used, no matter who the parties are in the action. Thus, if a party acquitted of assault and battery for which he has been indicted, brings an action for malicious

¹ Clements v. Clements, 37 N. Y. 75.

² Plate v. N. Y. C. R. R. 17 N. Y. 472.

prosecution, the record is evidence for the plaintiff to establish the fact of his acquittal, notwithstanding the parties are not the same, for in one case the State would be the plaintiff and the other party defendant, and in the civil action it would be between two parties for another and different action. But it is directly the converse of this if the party is convicted and he is then sued in trespass for the assault. The record in the action for assault can not be used in the subsequent action for trespass as evidence to establish the assault as to the matter in litigation; in trespass as to that action it is *res inter alios acta*. Thus, in *Tyler v. Ulman*,¹ the judgment against a sheriff for the misconduct of his deputy is evidence against the deputy that the sheriff has been compelled to pay the amount awarded, and for the cause averred, but is it not evidence against the deputy of his misconduct unless he was notified of the suit and required to defend. It may, therefore, be stated as a general rule that while a verdict and judgment in a criminal case may be and is admissible and conclusive evidence in regard to its own rendition, it cannot be used in a civil action to establish the fact upon which it was rendered. For the obvious reasons that the party may have been convicted upon the evidence of the very plaintiff in the civil action; if acquitted it may have been by collusion with the prosecutor. There is no mutuality; the parties are not the same. Estoppels should be reciprocal;² neither is the manner of proceeding the same, nor can the defendant in the criminal action avail himself of any admission the plaintiff in the civil action might make; and the jury in the criminal trial must be satisfied of the party's guilt, while in the civil action the verdict is rendered generally on the mere preponderance of evidence, and for these same reasons it must be clearly apparent that a judgment in a civil action can not be used in a criminal proceeding. But a conviction and sentence by a U. S. district court of one charged with crimes, is conclusive on every other tribunal.³ A record that is *res inter alios acta* is ad-

¹ 12 Mass. 66.

² *Towsley v. Johnson*, ¹ Neb. 95.

³ *Ableman v. Booth*, 21 Howard, 506.

missible in an action against a sheriff for neglect in regard to an execution, or to show the testimony of a former trial, or when the judgment constitutes one of the muniments of the party's title to an estate, as where a deed was made under a decree in chancery or a sale was made by a sheriff under an execution, or where the recovery of a judgment operates to change or create a title, and it is on this principle that decisions of admiralty and prize courts are admissible as they transfer property. So in Pennsylvania, by recovering a judgment in trespass for carrying away goods, the plaintiff's property in them becomes divested, and consequently such judgment is admissible in favor of a stranger, who is subsequently sued in assumpsit by the same plaintiff for the proceeds or price of the goods.¹

SEC. 156. The record of an acquittal or conviction upon a criminal charge, is generally pleadable in bar, or conclusive evidence upon another indictment or other proceeding for the same offence. The parties are the same in both, and no one ought to be put in jeopardy twice for the same offence. Upon this ground it has been held that a person tried and acquitted by a competent tribunal, though in a foreign country, could not be tried again for the same offence,² unless it were done for the purpose of defeating justice and in fraud of the rightful sovereignty. A judgment in a criminal proceeding is in the nature of a judgment *in rem*; such a judgment standing unreversed is conclusive evidence as to all its consequences, though there are some limitations to their conclusive effect. Thus, while an accessory to a felony, notwithstanding the judgment against his principal, is entitled to controvert his guilt, it is only *prima facie* evidence. But this is perhaps the only case where a judgment founded on a verdict is not conclusive as to the attainder of the principal. For a judgment in a criminal matter, so far as it regards all the consequences of the judgment, is binding upon all; the attainder of a criminal is, as long as it remains in force, conclusive upon all claiming from or through the party attainted. Upon the

¹ Floyd v. Brown, 1 Rawle, 122; Marsh v. Pier, 4 Id., 273.

² Hutchinson's Case, 1 Show. 6; Buller's N. P. 245.

same grounds, decisions in inferior courts of justice, convictions by magistrates, and in fact, all other legal and authorized adjudications—as, for instance, sentences of expulsion from colleges, or court martials, or deprivations by visitors—are evidence to establish the fact that such an adjudication has taken place, and all the legal consequences that may be derived from it. One of these legal consequences is the protection of any party who has acted in a judicial capacity within the limits of his judicial authority. In order to insure parties this protection the law declares that where actions are brought against magistrates and others, in consequence of what has been done under a conviction for any offence within their jurisdiction, the proceedings, themselves, if regular, are evidence not only of the fact of the conviction, but of the fact on which the judgment was founded; and the plaintiff is not at liberty to controvert and disprove it by evidence. For while a magistrate may form an erroneous opinion upon the facts, that is a matter that is properly a subject of appeal, and therefore where an appeal lies no action can be maintained until the merits have been heard and the conviction quashed.¹ Upon the same principle it has been held that upon an indictment for assault in turning the prosecutor out of a college, the sentence of expulsion is conclusive evidence of the fact of the expulsion.² One who is appointed a visitor may examine into and regulate the conduct of members who partake of the charity, correct abuses and remove officers, and in a case of a college, expel or admit a fellow, and generally superintend the management of the trust. No court of law or equity can anticipate the judgment of a visitor, or take away his jurisdiction of the case in which he is called upon to interfere, if it appear to be within the scope of the general visitorial power. His determinations are final and conclusive, since it is in the nature of a judgment *in rem*, and he pronounces operatively upon the status of the party. A sentence of deprivation passed upon an old rector, was held conclusive in ejectionment on the new rector. In Massachusetts there is a

¹ Fuller v. Fotch, Holt, 287; 7 T. R. 631; Baylis v. Strickland. 1 M. & G. 591.

² R. v. Grindon, Cowp. 315; Reg. v. Govs. Darlington School, 6 Q. B. 682.

statute giving an appeal to the Supreme Court from the decision of visitors appointed by the founders of charitable institutions removing a professor, but they have only the power of inquiring whether the visitors have exceeded their jurisdiction; if they have not, their decision is as final and conclusive as a judgment *in rem*. Courts look upon the determination of visitors or trustees as the criterion of the rights of parties, and a mandamus to restore the fellow of a college, has been frequently refused. Still they are like judgments, impeachable for excess of jurisdiction, but not for informality or irregularity. Sentence of deprivation by a visitor differs from other determinations in this respect, viz: that it is the sentence of a tribunal which has, in many cases, been created by a private individual. This does not alter the principle; for though no private individual can create a court whose sentence shall have operation on the persons or properties of others, yet there is no reason why he should not create one having operation on his own, unless he introduced some term inconsistent with public policy. On the same ground on which a visitor's sentence is conclusive, stands the case of the trustees of a school, dismissing a school teacher for misconduct.

SEC. 157. There are also other courts not of record that may be termed *quasi* of record, and among these are the military and naval courts or courts martial. The sentence of a court martial seems to be conclusive in any action in the courts of common law. These courts being established by positive law, their proceedings must depend upon the same rules as all other courts which are instituted and have particular powers given them. But where a party relying on the sentence of a court martial as an estoppel neglects to have it placed on record, he can neither plead it as such, nor have the benefit of it. No judgment can be conclusive, unless the court had jurisdiction of the parties, and the jurisdiction of courts martial embraces first the soldiers by, and next the belligerents against whom the war is carried on.¹ The soldier subjects himself to military authority by enlisting or being mustered in. The belligerent who has

¹ Tyler v. Pomeroy, 8 Allen, 480; Walton v. Gavin, 16 Q. B. 41.

been guilty of an offence against the laws of war or of nations may be tried and convicted as a spy or assassin, because there is no other tribunal before which he can be brought, and the vanquished are at the disposal of the victor. The first class may moreover sometimes, and on the ground of necessity, include the whole population of a district manaced or invaded by a hostile force too powerful to be resisted without calling every one to arms, and subjecting all to that discipline of the court which is known as martial law. Beyond this the jurisdiction of such courts cannot extend consistently with the constitution of the United States or the common law, and as they are limited and inferior tribunals they act in all cases at their peril, and must plead and prove their authority when called to account subsequently for what they have done before the civil courts and in the ordinary courts of law.¹ *Prima facie* the citizen is entitled to a jury, and not liable to trial and conviction by a military tribunal, and the burden lies on those who allege the contrary to charge him, or for their own vindication. The suspension of the writ of habeas corpus does not vary this rule or enlarge the boundaries of martial law. It may temporarily preclude the right to demand a trial and a release from the civil tribunals, but it cannot give legal force or validity to the sentence of a court martial.

SEC. 158. The constitutional provision that no "person shall subject for the same offence to be twice put in jeopardy of life or limb," is equivalent to declaration of the common law principle that no man shall be twice tried for the same offence. This principle may be stated thus: a regular conviction or acquittal upon a sufficient indictment is a good plea in bar to a subsequent prosecution for the same offence. But it is not necessary that the charges in the two indictments should be precisely the same; it is sufficient if an acquittal from the offence charged in the first indictment virtually includes an acquittal from that set forth in the second, however they may differ in decree. Thus an acquittal

¹ *Wise v. Withers*, *Wilson v. McKenzie*, 7 Hill, 95, 99; *Warden v. Bailey*, 7 Taunton, 67, 4 M. & S. 400.

on an indictment for murder will be a good bar to an indictment for manslaughter, and the *converse* an acquittal on an indictment for manslaughter will be a bar to a prosecution for murder. The true test by which to decide whether a plea of *autre fois* acquit, or *autre fois* convict, is a sufficient bar in any particular case is whether the evidence necessary to support the second indictment would have been sufficient to procure a legal conviction upon the first.¹

SEC. 159. An award ordinarily has the force of a judgment and concludes the parties from litigating the matters submitted to the arbitrators, on any subsequent occasion; and when the submission is acquiesced in by both parties has as to them the effect of a final judgment. Their jurisdiction is an exclusive jurisdiction created by the parties and it cannot be shown that they proceeded on a mistake,² nor can the award be impeached at *nisi prius* for corruption.³ But it may be shown that the arbitrators have exceeded their jurisdiction and adjudicated upon matters not submitted to them.⁴ But the award itself cannot be contradicted or shown to mean something different from what it expresses.⁵ A submission to arbitrators which is the act of both parties, is more binding than the averments in a declaration, which proceeds only from one, and when the submission is of all matters in dispute, or is of all demands, the estoppel is co-extensive with the submission. It cannot be shown that a particular demand was not laid before the arbitrators for the obvious reason that the submission was the final adjustment and adjudication of every matter in controversy, and neither party is allowed to defeat it. In Massachusetts a different rule has been established and either party has been allowed to introduce evidence that a particular demand had not been submitted to the arbitrators, although the submission purported to be of all demands, and a similar rule has been

¹ Commonwealth v. Roby, 12 Pick. 496.

² Johnson v. Durant, 2 B. & A. 931.; Ashton v. Poynter, 1 C. M. & R. 738.

³ Wells v. Maccarnick, 2 Wils. 148; Braddick v. Thompson, 8 East, 344; Brazier v. Bryant, 3 Bing. 167.

⁴ Butler v. Mayor of N. Y., 1 Hill, 489, S. C. 7 Hill, 329.

⁵ Duke v. James, 4 N. Y. 568.

adopted in other states.¹ But the general tendency of the various courts is to limit this rule rather than extend it. An award of arbitrators decides the rights of the parties as effectually as a judgment at law or a decree in chancery, and is as binding until regularly set aside, or its validity questioned in a proper manner. When not made under a rule of court, it may be annulled by a decree in chancery, or on a bill showing corrupt practices of the arbitrators or parties, or the mistake of the former or any accident or proper grounds for a new trial attending the case of the losing party. But he can never overleap it treating it as void, and litigate it anew by commencing an action as if it had not been made, and in a collateral manner attack its validity.²

SEC. 160. At common law the award of arbitrators, regularly made and in relation to a matter which might have been submitted, is conclusive between the parties in a contest involving the same matter. They are as conclusive as the judgments of courts. Choosing arbitrators, and they acting within the pale of their authority, the award becomes the act of the parties, and they are estopped by it. No action can be maintained to recover money paid under an award, on the ground that it was obtained fraudulently or by false testimony.³ Nor can a defendant when a suit is brought to enforce an award, set up anything as a defence which was a proper answer to the plaintiff's claim before the arbitrators.⁴ If he has such a defence it should be made before the arbitrators, and their award whether right or wrong is conclusive as long as they keep within the scope of their submission. An award extinguishes the original demand, and is a bar to any action upon it, and even when the award is made upon a parol submission. But this rule of conclusiveness must be understood with this qualification, that the award is a valid and binding one, and the arbitrators must have had jurisdiction.

¹ Webster v. Lee, 5 Mass. 334.; Hodges v. Hodges, 9 Id. 320.; Smith v. Whiting, 11 Id. 447; King v. Savory, 8 Cush. 309; Bixby v. Whitney, 5 Greenleaf, 192; Burk v. Burk, 2 Vt. 420.

² Buckley v. Stewart, 1 Day (Conn.) 130.

³ Bulkey v. Stewart, 1 Day, 130.

⁴ Waite v. Baray, 12 Wend. 377.

SEC. 157. Arbitrators acquire their jurisdiction or power from the agreement to submit, and this authority must be observed ; it is this alone that gives them jurisdiction. The presumption is that they have acted within the scope of their submission, unless the contrary appears, and every reasonable intendment will be allowed to sustain an award. They must be certain, final and mutual. An award that proof sufficient had not been produced to establish a claim against the defendant, is equivalent to saying that the plaintiff had no cause of action, and is final and conclusive¹ where it appears that the arbitrators have in all respects pursued and kept within the authority conferred upon them by the submission, and the award comes into question collaterally, in a court of law or equity, nothing *dehors*, the award is in general admissible in evidence for the purpose of impeaching it, or avoiding its force or effect. An award, like a judgment of a court of concurrent jurisdiction, binds only parties and privies so as to estop them from again litigating the same subject matter which was determined by the award. Strangers to the award can neither be benefited or prejudiced by it.

SEC. 161. A *feme covert* cannot as such bind herself or her husband by an award unless she was acting as the agent of her husband, and the right to attack an award is confined to parties and privies ; strangers or third persons cannot impeach it.² An award concludes the parties and those claiming under them, and one claiming under a party to the award may avail himself of it to conclude the other party and those claiming under him.³ The testimony of an auditor, referee or arbitrator, to whom a case has been referred, is inadmissible to contradict or modify it.⁴ *An award* is an entire thing and cannot be affirmed in part and disaffirmed in part. Where one accepts a benefit under an award, he is estopped from denying its validity, and it is immaterial whether the award was made under the submission or not.⁵

¹ McDermott v. U. S., 3 Serg. & R., 604.

² Penniman v. Patchin, 6 Vt. 325.

³ Shelton v. Alcox, 11 Conn. 240.

⁴ Packard v. Reynolds, 100 Mass. 153.

⁵ Kellogg v. United States, Nott & H. 310.

SEC. 162. Judgments and decrees binds parties and privies only ; where therefore one binds and obliges himself that the defendant in one attachment suit would cause the property levied upon and replevied by the said bond, to be forthcoming to abide the final order of the court in the said suit, he connects himself in privity with the proceeding therein, and makes the record of the judgment conclusive against him. So where an appellant seeks the jurisdiction of a court and executes a bond in replevin, in order to avail himself of it, he cannot object to that jurisdiction in an appellate court, for by his acts and admissions he acknowledges the jurisdiction and is estopped by them.¹ The sureties in an undertaking on appeal from a judgment are estopped by the recitals in their undertaking from questioning the correctness of the amount of costs in the judgment appealed from when sued under their undertaking.² And where a deputy sheriff, with sureties, has given a bond to indemnify the sheriff against damages resulting from the acts or omissions of the deputy in his office, the sureties are concluded by a judgment against the sheriff in an action founded on the deputy's negligence, which action the deputy defended upon notice from the sheriff.³ So where an order is made by a surrogate for the payment of money by an administrator, and the order is affirmed on appeal, the sureties on the administrator's bond are estopped by such affirmance, equally with the administrator from alleging any defect or error in the proceedings before the surrogate.⁴ A judgment for money due at a certain time against the party making the settlement is conclusive in respect to the parties to it, and cannot be impeached collaterally, nor can it be questioned on a creditor's bill.⁵

SEC. 163. The decree of every court of competent jurisdiction on the point in issue before it can only be reviewed in the regular course of appeal, and as long as it continues in force, the decree, if it be a decree of a court of peculiar and exclusive

¹ Bates v. Williams, 43 Ill. 494.

² Levi v. Dorn, 28 How. Pr. 217.

³ Fay v. Rivers, 44 Barb. 327.

⁴ Baggot v. Bulger, 2 Duer, 160.

⁵ Mattingly v. Nye, 8 Wallace, 370.

jurisdiction in the case, is conclusive upon all other courts.¹ A judgment in partition estops all parties to the suit and all parties claiming in privity with them. The deed is made by the sheriff under an order of sale in partition, and is the act of the parties themselves, and a purchaser at such a sale is regarded as a grantee. The transfer to the purchaser is a complete extinguishment of the title of the parties to the action.² After the recovery of a judgment in garnishment against "A." as the vendee of certain goods from B. "B.'s" creditors cannot attach the goods on the ground of fraud in the sale to "A." A party cannot maintain such inconsistent positions affirming at one time that it is valid and then that it is void as to creditors; by obtaining judgment against the vendee in garnishment proceedings, they must have elected to treat the sale as valid. So where a vendor sells goods for cash and obtains a redelivery by replevin it disaffirms the sale and he cannot maintain an action for the price of the goods for it is extinguished.³ A party cannot affirm a contract in part and rescind it in part. A party having an election to rescind a contract, must rescind it wholly, or in no part; he cannot consider it void to reclaim his property or the value thereof, and at the same time consider it in force for the purpose of recovering thereon; nor can a contract be rescinded to one party and remain in force as to the other. So where a judgment is recovered by the plaintiff against the defendant, for a breach of contract in misappropriating moneys entrusted to him to purchase goods for the plaintiff, such plaintiff is estopped from claiming ownership of the goods purchased, both as against the defendant and any subsequent purchaser; and where an action is brought by a subsequent purchaser of the goods, against his vendee for the price of the goods, such vendee is estopped from setting up as a defense that the plaintiff in the judgment is the true owner, and that he has paid him the price of the goods as such.⁴

¹ *Gelston v. Hays*, 1 John. ch. 543.

² *Pentz v. Keuster*, 41 Mo. 447.

³ *Morris v. Rexford*, 18 N. Y. 552; *Carter v. Smith*, 23 Wis. 497; *Geiser v. Beal*, 3 Wis. 367; *Allen v. Roosevelt*, 15 Wend. 100.

⁴ *Bank of Beloit v. Beale*, 24 N. Y. 473.

SEC. 164. Where money has been paid by the party, either plaintiff or defendant, which is afterwards discovered not to be due or that it has been paid twice, the party making the double payment cannot recover it back in an action for money had and received. In the case of *Mariot v. Hampton*, 7 T. R. 269, a case cited perhaps more than any other on this subject which has been heretofore referred to, in illustrating the doctrine of *res adjudicata*, Lord Kenyon, in delivering the opinion of the court stated, "that after money had been paid under legal process it could not be recovered back again however unconscientiously retained. In an action for the recovery of the money," he said "I am afraid of establishing such a precedent. If this action could be maintained, I know not what cause of action ever could be at rest. After a recovery by process at law there must be an end to litigation, otherwise there would be no security for any person. I cannot therefore grant a rule to show cause lest it should imply a doubt. It would tend to encourage the greatest negligence if we were to open the door to parties to try their causes again because they were not properly prepared the first time with their evidence; were it so, every species of evidence which was omitted by accident to be brought forward and used at the trial might be made available in a new action to overhaul the former judgment, which is too preposterous to be stated. Money paid under compulsion of law cannot be recovered back as money had and received, and where it is paid with full knowledge of facts though there be no debt, still it cannot be recovered back in a new suit founded on matter that would have been a defence to a former action. Even equity will not grant relief in such a case. If a party pays a demand unjustly made upon him and attempted to be enforced by legal process, he cannot recover the money back as paid by compulsion unless there be fraud in the party enforcing the claim; and if the party may avoid paying it by pleading payment or any other defence in the action upon which the judgment is rendered he is afterwards estopped from recovering it back. Money retained under the award of a tribunal clothed with the jurisdiction of the subject matter, and

from whose decision there is no appeal is in legal effect money paid under a judgment and cannot be recovered back."

SEC. 165. If a party read the cross-examination of a witness, examined *de bene esse* it estops him from objecting to his competency to testify,¹ and one who in various legal proceedings has treated certain parties as the assignees of a bankrupt, is estopped from denying their title, in a subsequent suit;² where a matter is directly in issue and determined in a court of common law, the judgment may be set up as an estoppel in a court of admiralty.³ So a party intervening as mortgagee in a suit on a bottomry bond is estopped from claiming the surplus as owner, against the borrower.⁴ So a ship which has received a cargo, carried it to its destination, and libelled it for freight, is estopped from denying her responsibility for damages to it in *transitu*.⁵ So in an action on a bond for the prison bounds, the defendant is estopped from denying the existence of the original judgment.⁶ The instances cited sustain the rule that the effect of what takes place in one judicial proceeding upon another, is attributed to equitable rather than legal or technical estoppel, and a party who obtains or defeats a judgment by pleading or representing a thing or judgment in one aspect is estopped from giving it another in a suit founded upon the same subject matter.⁷ Pleading a former recovery as an estoppel or taking advantage of it as a valid judgment, will estop the party from reversing it on error, or averring that it was fraudulent or void.⁸ In *Bailey v. Bailey*.⁸ A woman was held to be estopped from appealing from a decree of divorce by suing her husband in replevin, and obtaining judgment as if she was sole, while in *13 Howard*,⁷ the defendants

¹ *The Osceola*, Olcott's Rep. 450.

² *Stokes v. Mowatt*, 1 U. S. L. J., 309.

³ *Goodrich v. Chicago City*, 5 Wall, 566.

⁴ *The Panama*, Olcott, 343.

⁵ *Water Witch*, 1 Bl. 494.

⁶ *Allen v. McGruder*, 3 Cr. C. C. 6.

⁷ *P. W. & B. R. R. Co. v. Howard*, 13 How. 307; *Carlisle v. Foster*, 10 Ohio, S. 198; *Ogden v. Rowley*, 15 Ind., 56; *Regina v. Sandwich*, 10 Q. B. 563; *Martin v. Ives*, 17 S. & R. 564.

⁸ *Martin v. Ives*, 17 S. & R. 564; *Bailey v. Bailey*, 44 Penn. St., 247.

succeeded in obtaining judgment by impeaching a bond and were held to be estopped from relying on the same bond as a defence in another action brought by the same plaintiff, which is on the principle that a party who desires to affirm what he might avoid cannot after his affirmance retract to the injury of others.

SEC. 166. When an officer returns a writ as duly served, the defendant is estopped from contradicting such return as against third parties who have acquired rights under the judgment of the court. This seems a somewhat harsh doctrine, but the remedy of the injured party is against the officer for making a false return.¹ A party who is duly served under process, and against whom a judgment has been rendered for want of proper defence cannot invoke the subsequent interposition of a court of equity to set aside a judgment on the ground that he was not a resident of the state, and that by fraudulent misrepresentations he had been induced to come within the jurisdiction, so that process might be served on him. The objection should have been taken by appearing in the original suit, and moving to set aside the service of process, as procured by fraud.²

SEC. 167. The plea of *res adjudicata* applies to every objection urged in a second suit, when the objection was open to the party within the legitimate scope of the pleadings of the former one and might have been presented in it.³ Thus a judgment in favor of a bondholder upon certain municipal bonds, part of a large issue, against the town issuing them, is conclusive on a question of the validity of the issue on a suit brought by the same creditor against the same town on other bonds; another part of the same issue, the parties being identical, and all the objections taken by the town in the second having been open to be taken by it in the former one.⁴ So where under a clause of re-entry for non-payment of rent reserved, a landlord sues in ejectment, in a state in which the judgment has the same conclusiveness, as common

¹ Rivard v. Gardinier, 39 Ill. 125.

² Marsh. admr's v. Bast. 41 Mo. 493.

³ Sheets v. Selden, 7 Wall, 416; Henderson v. Henderson, 2 Hare, 115; Babcock v. Camp, 11 Ohio St. 11.

⁴ Beloit v. Morgan, 7 Wall., 619.

law judgments in other cases, for a recovery of his estate a verdict is found for him; and judgment given accordingly, the tenant cannot in an other proceeding, deny the validity of the lease, nor his possession, nor his obligation to pay the rents reserved, nor that the instalment of rent demanded was due and unpaid.¹ So where a judgment has been rendered against a principal and his security in a bond, and the security sues the principal after satisfying the judgment for money paid to his use, the principal is estopped from alleging illegality or want of consideration in the bond. The bond being merged in the judgment the proper place to make that defence was on the former suit.² So where, in an action against a railroad company the parties agree to submit the case to a jury to find the full amount of the damages past, present and future, and agreed that no future actions should be brought after the rendition of the verdict and judgment, the judgment is a bar to any future action brought by the party making the agreement; for in a case of this kind, whatever injuries were proven, were of the character the parties had in view when they stipulated that no further action should be brought.³ So where an action is brought against a city for its neglect to do a public duty imposed upon it by law, the declaration going upon its neglect to do the thing at all; a judgment that it was not bound to do the thing at all, may be used as an estoppel in another suit, where the allegation is, that being bound, it entered upon its duty, but never finished the work, by which neglect to finish the injury occurred.⁴

SEC. 168. A judgment to be effectual and binding as an estoppel, must show that the subject matter has been passed on and adjudicated, and binds parties and privies, and it must be based on the jurisdiction of the person or of the subject matter. If either are wanting, the whole proceedings are *coram non judice*, and may be questioned in either a direct or collateral proceeding; the decree in such a case being void, all

¹ Sheets v. Selden, Id.

² Pitts v. Furgate's admrs. 41 Mo. 405.

³ I. C. R. R. v. Allen, 29 Ill. 205.

⁴ Goodrich v. City, 6 Wall, 566

acts under it are void, and all rights flowing from it are of the same character.¹ But when jurisdiction is shown, it is conclusive not only as to matters actually determined, but as to every other thing then within the knowledge of the complainant in the suit which might have been set up as a ground for relief, and litigated in the first suit.²

SEC. 169. A question that is pending in one court of competent jurisdiction cannot be raised and agitated in another by adding and raising a new question with the old one as to the former party. The old one is in the hands of the court first possessed of it, and is to be decided by such court;³ and where a matter is directly in issue and adjudged in a court of common law, that judgment may be set up as an estoppel in a court of admiralty.⁴ In Illinois the doctrine of conclusiveness of judgments is that they are conclusive between the same parties in a subsequent proceeding upon the same matter; and not only as to matters actually determined, but as to every other thing then within the knowledge of the complainant in the suit, which might have then been set up as a ground for relief and litigated in the first suit;⁵ and this seems to be the only method of putting in practice the fundamental principle of *Interest reipublicae ut sit finis litium*. But the general rule, and it seems to be supported by the weight of authorities, is that a judgment is conclusive only as to the matters directly in issue in the former suit.

SEC. 170. In the case of *King v. Chase*, 15 N. H. 13, Chief Justice Parker citing many authorities, in delivering the opinion of the court in regard to the question of what is the matter in issue, said "a verdict and judgment between third parties may be offered in evidence by way of inducement, or to establish a collateral fact."⁶ In those cases it is only by way of proof of the fact tried or found. And if that matter does not appear, by reason of the generality of

¹ *Campbell v. McCahan*, 41 Ill. 45.

² *Hamilton v. Quimby*, 46 Ill. 90; *Garraher v. Prentiss*, 22 Ill. 317.

³ *Memphis v. Dean*, 8 Wall, 64.

⁴ *Goodrich v. City*, 6 Wall, 566.

⁵ *Hamilton v. Quimby*, 46 Ill. 90; *Garraher v. Prentiss*, 22 Ill. 317.

⁶ *Greenl. Evid.* 564.

the pleadings, it may be made certain by evidence *aliunde*.¹ When thus offered it is usually conclusive evidence of the fact established by it, and no more.² A verdict and judgment may be used as evidence between the same parties and their privies, as a bar, in another action for the same cause. The matter may be pleaded if there be an opportunity to plead it. When thus pleaded it is conclusive.

“And where there is no opportunity to plead the judgment in bar, it may be given in evidence, and is equally conclusive of the matter which is established by it.”³

“There are cases which hold that it may be evidence between the parties when offered as a bar, but not conclusive evidence.⁴ But this cannot be supported upon principle.” The operation of such a rule would be to authorize the introduction of the verdict of one jury in evidence, not to show that the matter in question had been tried and settled, but to influence the minds of a jury, having a similar question before them, to find the fact in the same way that the former jury found it—upon the faith that the first jury were capable, and duly investigated the subject upon competent proofs, and therefore probably found the fact correctly. It is quite evident that the weight to be given to it in that view is entirely uncertain. In order to understand its true value, and the weight which ought to be given to it in establishing the matter in question and upon trial, that it may appear how distinctly the proofs and arguments were laid before them. The proofs themselves, and the arguments used on the former trial, should also be shown; for otherwise the second jury could not know whether the case was fully considered. And to all these there should be added a statement of the grounds upon which the former jury proceeded in making up their verdict.”

“It is only upon evidence of this character that the jury, to whose consideration the verdict and judgment are offered as a matter of evidence which should have some influence

¹ Parker's *Admr. vs. Thompson*, 3 Pick. R. 429

² 1 Stark. Ev. 183-187.

³ *Dame. vs. Wingate*, 12 N. H.

⁴ *Kinnersley vs. Orpe*, see Doug. 517.

in determining the disputed fact, can have any reasonable idea how much weight they ought to attach to it. But this evidence they cannot have.”¹

SEC. 171. “If a verdict and judgment are admitted as evidence of any matter tried and found, they furnish evidence that it has passed *in rem judicatum*. If so, that is a mere matter to influence a jury, or not, according as opinion, whim, or caprice, or even as a sound judgment respecting the competency of the former jury to judge, may dictate.” “As a mere fact, it has no bearing upon the merits of the case, in connection with other evidence of facts to show the truth of the matter previously found; because it is not a fact which occurred in connection with such other facts, but it is of itself a conclusion, or results from the consideration, or trial, or admission, of such other facts, or some of them.”

“As evidence to show that the matter in controversy between the parties, has been considered, settled and passed into judgment, it is conclusive.”

“And here again, if from the general nature of the pleadings the matter which has been tried does not appear upon the face of the record, it may be shown by other evidence.”

“But the judgment is thus conclusive only upon the matter which was directly in issue upon the former trial; and the question arises, what is to be understood by the ‘matter in issue?’ *The Dutchess of Kingston’s case*, 11 State Trials, 261, furnishes the rule. It has been repeatedly sanctioned.”

“From the variety of cases (said Lord Chief Justice De Grey, in that case,) relative to judgments being given in evidence in civil suits, these two deductions seem to follow as generally true; first, that the judgment of a court of concurrent jurisdiction, directly upon the point is as a plea, a bar; or, as evidence, conclusive between the same parties, upon the same matter, directly in question in another court; secondly, that the judgment of a court of exclusive jurisdiction directly upon the point, is, in like manner, conclusive upon the same matter, between the same parties, coming incidentally in question in another court, for a different pur-

¹ 3 Stark. Ev. (1 Am. Ed.) 1297; 1 Phil. Ev. (5 Am. Ed.) 323

pose. But neither the judgment of a concurrent or exclusive jurisdiction is evidence of any matter which came collaterally in question, though within their jurisdiction; nor of any matter incidentally cognizable; nor of any matter to be inferred by argument from the judgment."¹

"All are agreed in the rule, but the difficulty lies in its application, in determining what is meant by a judgment directly upon the point."²

"Any fact attempted to be established by evidence, and controverted by the adverse party, may be said to be in issue, in one sense. As, for instance, in an action of trespass, if the defendant alleges and attempts to prove that he was in another place than that where the plaintiff's evidence would show him to have been at a certain time, it may be said that this controverted fact is a matter in issue between the parties. This may be tried, and may be the only matter put in controversy by the evidence of the parties."

"But this is not the matter in issue, within the meaning of the rule."

"It is that matter upon which the plaintiff proceeds by his action, and which the defendant controverts by his pleadings, which is in issue."

"The declarations and pleadings may show specifically what this is, or they may not. If they do not, the party may adduce other evidence to show what was in issue, and thereby *make the pleadings as if they were special*."

SEC. 172. "But facts offered in evidence to establish the matters in issue, are not themselves in issue, within the meaning of the rule, although they may be controverted on the trial. Deeds which are merely offered in evidence are not in issue, even if their authenticity be denied."

"When a deed is merely offered as evidence to show a title, whether in a real or personal action, there is no *non est factum* involved in the matters put in issue by the plea of *nul disseizin*, or not guilty, which makes the execution of

¹ 20 How. St. Trials, 578; Greenl. Ev. 565; 1 Phil. Ev. 324; Hale's Com. Law, 33, note.

² 1 Stark. Ev. 190; Hitchin v. Campbell, 2 Wm. Black.; Matlett v. Foxcroft, 1 Story's C. C. R. 474; Wadleigh v. Vezie, 3 Sumner's R. 165.

that deed a matter in issue in the case, notwithstanding the jury may be required to pass upon the fact of its execution. The verdict and judgment do not establish that fact one way or the other, so that the finding is evidence. The title is in issue. The deed comes in controversy directly, in one sense; that is, in the course taken by the evidence, it is direct and essential. But in another sense it is incidental and collateral. It is not a matter necessary, of itself, to the finding of the issue. It may be made so by the parties."

"This may be illustrated by the case before us. Laying out of consideration the question whether this is a case between the same parties, the former action was for taking certain oats. The matter in issue was the title to the oats, and the conversion by the defendant in that case. Upon that the jury passed. They found that the plaintiff had no title, or that the defendant did not convert them, which may be involved in the first."

"It may be shown by parol evidence, if necessary, upon which ground the verdict proceeded, and it appears in this case that they found the plaintiff had no title. The conversion by the defendant in that case was not denied if the plaintiff had title."

"That matter then is settled. The verdict and judgment may be given in evidence in another action for the oats between those parties and is conclusive. But that is the extent of what was in issue."

"It appears that the title set up in that case was by a mortgage. In finding that the plaintiff had no title, the jury must have been of opinion that the mortgage was fraudulent. It is contended that this was in issue and the only matter in issue."

"But this was only a controversy about a particular matter of evidence upon which the plaintiff then relied to show title. If that was the only matter in issue, the plaintiff might bring another suit for those oats, against the same defendant, and, relying upon some other title, than that mortgage, try the title to the oats over again. Can he do so? Clearly not; and the reason is, that it is his title which has been tried, and he is concluded."

"The title, however, which has been tried, was only his title to the oats."

"The question whether the mortgage was fraudulent, came up only incidentally, by reason of his relying on that as his title. But the mortgage was not the matter in issue."¹

"And while the finding is conclusive on the question of his title to the oats, it is neither conclusive, nor evidence, upon anything else, because nothing else was in issue."

SEC. 173. "It appears from this that it is important to apply the rule to what was in issue in the action, and not to what was merely incidentally in controversy in the evidence."

"It is important for the security of both parties. In this case, there might be no great mischief, if the rule was held to apply to the matter in evidence, instead of that in issue. The controversy in the former case seems to have been simple. If the parties were the same, the plaintiff might not complain of injustice, if it were held that he is concluded by the finding of the former jury; having once admitted the controversy raised by the evidence, whether the mortgage was fraudulent to a jury, and their verdict having shown that they must have so found it. But the principle applicable here must be applied in other cases, where the matters in evidence are more complicated, and where it would admit of more doubt how the jury regarded the evidence, and what facts they actually found."

"The rule then would have to be confined to what the jury must necessarily have found, which would still shut out as evidence a great many matters actually tried, and as clearly found as anything in relation to this mortgage; or it must in many cases be left to the testimony of the jurors what facts they did find, which, when applied to all the controverted matters of evidence arising in a cause, might lead to great uncertainty and confusion."

"On the other hand, it would be great injustice to the defendant in the former action to hold that the matter in question was whether the plaintiff's mortgage was fraudulent or not; that this was tried in that case and not his title

¹ *Town v. Nims*, 5 N. H. 225.

generally ; and that the plaintiff might commence another suit for the oats and set up another title, because no other title except the mortgage title had been tried."

"The title to the property now in question has not been tried. If the plaintiff has no title to it but the mortgage, the defendant may show that the mortgage was fraudulent, by the same evidence by which that matter was shown before."¹

"There are cases which conflict to some extent with the principle we have thus stated ; some of them holding that in order to make a record evidence to conclude any matter, it should appear from the record itself that the matter was in issue, and that evidence cannot be admitted to show that under such a record any particular matter came in question ; while others maintain that a former judgment may be given in evidence, accompanied with such parol proof as is necessary to show the grounds upon which it proceeded, where such grounds, from the form of the issue, do not appear by the record itself ; provided that the matters alleged to have been passed upon be such as might legitimately have been given in evidence under the issue joined, and such that, when proved to have been given in evidence, it is manifest by the verdict and judgment that they must have been directly and necessarily in question and passed upon by the jury."

SEC. 174. "While on the one hand we do not, with the Supreme Court, deem it essential that the record should of itself show that the matter was in issue, in order to make the determination of it conclusive ; we are of opinion, on the other, that the general principle laid down in the court of errors is too broad, in holding the judgment to be conclusive upon all matters which might legitimately have been given in evidence under the issue joined, and such that, when proved to have been given in evidence, it is manifest by the verdict and judgment that they must have been directly and necessarily in question and passed upon by the jury : as this must include all matters which came in ques-

¹ Jackson vs. Wood, 3 Wend. R. 27 ; Wood vs. Jackson in error, 8 Wend. 9.

tion collaterally, by the evidence offered, if they were of such a nature as that it appears the jury must or should have passed upon them."

"Upon the remaining point we are of opinion that there is sufficient privity between the sheriff and his deputy, here, to make the judgment in the suit against the deputy evidence, if it had been upon the same point now in issue. The sheriff is responsible for the acts of his deputy in attaching property. The plaintiff might have sued the defendant for the act of Stebbins in taking the oats. But he had the right also to sue Stebbins himself and this he elected to do. Having litigated the title to the oats with him, and failed, he ought to be precluded from trying the same matter in another suit against the defendant, on the ground that the defendant is responsible and that he had a right of action against him also."¹

SEC. 175. It is necessary that strict attention be given so as not to confound matters which were not determined with those which were adjudicated. A fact is not the less collateral, because it forms a portion of the thread of the issue, unless it runs to the final determination of it, and is essential in sustaining the judgment. A recovery against A. and B. on a note endorsed by B. in the name of A. & Co., does not necessarily estop A. from denying the existence of such a firm, and that he is one of the members of it in a subsequent suit. For while this is what the note implies if made with the knowledge and consent of A. and is established by the judgment, still the evidence upon which the judgment was rendered may have shown that B. had a special and limited authority which did not extend to any other transaction. If therefore the uncertainty arising from the transaction is removed by evidence *aliunde*, that the only question in issue in the former suit, was the question of partnership, and was in fact the only issue raised upon the former trial by the parties, and that that was the only issue submitted to the court or jury, the judgment is as conclusive as it is in any other case where the record is aided by extrinsic evidence.

¹ 1 Stark. Ev. § 61, 192 et. seq.

SEC. 176. The operation of a judgment as a merger of the cause of action, has often a more extensive effect than it has as an estoppel, and is conclusive upon all as extinguishing the original demand or cause of action in the new obligation or contract created by the judgment. A judgment against one of several partners on a firm note merges the original cause of action; and is a bar to another suit against the remaining parties.¹ So in an action brought against two or more of the makers of a joint or joint and several note or bond, without including all, it discharges the remainder of them, the obligation being lost in the judgment that binds only those parties against whom it is rendered.² A judgment on a bond or contract extinguishes that bond or contract, because there cannot be liabilities on both instruments, and a judgment and a bond both import an absolute liability; the legal obligation of the inferior obligation must be considered as at once blotted out.³ So a judgment against one joint debtor on a joint cause of action, merges the liability of all, and on the same principle a bond accepted from one joint debtor for a joint debt discharges the joint liability previously existing upon a simple contract, because since the bond is an obligation for the same debt, the one giving it must be discharged from his liability on the simple contract, as he cannot be liable on both; and if one joint debtor is discharged the other is. An extinguishment of a lower security by a higher is an operation of law, that no intention of the parties can prevent; no matter how explicit an agreement may be, it cannot prevent a promissory note from being merged in a bond given for the same debt; for to allow a debt to be, at the same time, of different degrees and recoverable by a multiplicity of inconsistent remedies, would increase litigation and cause unnecessary and vexatious delay.⁴ After a *scire facias* on a mortgage has ripened into judgment, the mortgage is merged in it, and even if null and

¹ Mason v. Eldred, 6 Wallace, 231; S. C. 16 Am. L. R. 402; Woodruff v. Spafford, 2 McL. 168.

² Bank of Columbus, 5 Ohio St. § 34; Olmstead v. Webster, 8 N. Y. 413.

³ U. S. v. Price, 9 Howard, 83.

⁴ Sydam v. Barber, 18 N. Y. 468; Bonesteel v. Tod, 9 Mich. 471.

void is no longer open to attack.¹ This doctrine conduces to peace and repose and cannot be disturbed without unsettling rules of property and producing irreparable mischief.

SEC. 177. A verdict on an issue in chancery for the information and convenience of the court, will not be conclusive between the parties, unless a decree is made in accordance with the verdict.² When the parties agree, expressly or by implication, that a verdict shall be final and conclusive as between them without the entry of a judgment, it will operate as an estoppel, on proof of the understanding or agreement.³ The removal of the record, by a writ of error, for review in a superior court, will in no way weaken or impair the conclusive effect of the judgment as an estoppel, although it may in some cases, operate as a *superseas* of the right to enforce it by execution.⁴ Ordinarily allegations and averments made in the pleadings, are not binding of themselves, and, aside from the conclusive effect that may be imparted to them by the judgment; and a declaration or bill filed in one suit cannot ordinarily, be read in evidence against the plaintiff in another.⁵ But when one party admits the allegations of the other by pleading in confession and avoidance, or controverting one of several averments, and thus impliedly acknowledging the justice of the rest, an estoppel will arise under these circumstances, notwithstanding a protestation that the matters which are not denied are equally unfounded with them which are, unless the traverse is sustained by the *verdict*, because it will be presumed that the pleader submitted the strongest point of his case to the jury, and would have been equally unsuccessful if he had joined issue on the others.⁶ A verdict and judgment on the plea of non-assumpsit in replevin, will accordingly be as conclusive in favor of the plaintiff in another action for the same goods, as if the right of property in the declaration

¹ Harbiman v. Ogborn, 54 Penn. 120.

² Saylor v. Hicks, 36 Penn. 392.

³ Shaffer & Kreitzee, 6 Bin. 432; Estop v. Hutchman, 14 S. & R. 435.

⁴ Doe v. Wright, 10 Q. B. 73.

⁵ Boilleau v. Rutlen, 2 Exch. 665; King v. Norman, 4 C. B. 884.

⁶ Stephen on Pl. 255.

had been put in issue and found in his favor, instead of being impliedly admitted.¹ When judgment is taken by default, the adjudication will be conclusive of the existence and validity of the right or demand for which ~~the~~ suit is brought.

¹ Wilson v. McClenning, 23 Ill. 410.

CHAPTER VII.

FOREIGN JUDGMENTS AND JUDGMENTS OF OTHER STATES.

SECTION 178. Having considered domestic judgments we now come to still another class of judgments, viz : Foreign judgments, and under this head we shall treat of judgments rendered without the United States, and those rendered in other states than those in which they are sought to be used as conclusive evidence, viz : Judgments of other states. In regard to judgments rendered in foreign countries, there has been great diversity of opinion among nations and jurists. Assuming that the question of jurisdiction is unimpeachable, the question has been in regard to their status in our courts, whether they are to be considered as conclusive of every fact litigated, or whether new evidence should be permissible to impeach them, or whether they might be examined on their original merits. These judicial determinations are like those already treated of, viz : Judgments *in rem*, *in personam*, and *in rem*, and *in personam*. The latter are again considered under several heads ; first, where the judgment is set up by way of defence to a suit in a foreign tribunal ; secondly, where it is sought to be enforced in a foreign tribunal against the original defendant, or his property ; and, thirdly, where the judgment is either between the subjects, or between foreigners, or between foreigners and subjects.¹ But in order to found a proper ground of recognition of a foreign judgment, under whichever of these aspects it may come to be considered, it is indispensable, to establish that the court which pronounced it had a lawful jurisdiction over the cause, over the thing, and over the parties. If the jurisdiction fails as to either, it is treated as a mere nullity, having no obligation, and entitled to no respect beyond the domestic tribunals.²

¹ Story. Conf. Laws, 584, 586 ; Rose v. Himley, 4 Cranch, 269.

² Smith v. Knowlton, 11 N. H. 191 ; Rangely v. Webster, Id. 299.

SEC. 179. Vattel in his law of nations says: "It is the province of every sovereignty to administer justice in all places within its own territory and under its own jurisdiction, to take cognizance of crimes committed there, and of the controversies that arise within it. Other nations ought to respect this right, and, as the administration of justice necessarily requires that every definitive sentence, regularly pronounced, be esteemed just and executed as such; when once a cause, in which foreigners are interested, has been decided in form, the sovereign of the defendants ought not to hear their complaints. To undertake to examine the justice of a definitive sentence is an attack upon the jurisdiction of the sovereign who passed it. Therefore Vattel deduces the general rule, that in consequence of this right of jurisdiction, the decision made by the judge of the place within the extent of his authority, ought to be respected, and to take effect even in foreign countries. While this doctrine seems to be reasonable and just it can hardly be said that the doctrine has been universally applied by modern nations under the common law; its application has been far more extensive and uniform than it has been in the jurisprudence of continental Europe.

SEC. 180. If a sentence or judgment of a court in a foreign country is a proceeding *in rem*, concerning movable property, it is by the general consent of nations conclusive against the whole world. In the celebrated case of the *Rose v. Himely*,¹ Chief Justice Marshall, in delivering the opinion of the court, said: "The power of the foreign court, then is, of necessity, examinable to a certain extent by that tribunal, which is compelled to decide whether its sentence has changed the right of property. The power under which it acts, must be looked into; and its authority to decide questions, which it professes to decide, must be considered. But although the general power, by which a court takes jurisdiction of causes must be inspected, in order to determine whether it may rightfully do what it professes to do, it is still a question of serious difficulty; whether the situation of the particular thing on which the sentence has passed may

¹ Cranch, 241-272.

be inquired into for the purpose of deciding whether that thing was in a state which subjected it to the jurisdiction of the court passing the sentence. For example, in every case of a foreign sentence condemning a vessel as a prize of war, the authority of the tribunal to act as a prize court must be examinable. Is the question, whether the vessel condemned was in a situation to subject her to the jurisdiction of that court, also examinable? This question, in the opinion of the court, must be answered in the affirmative. "Upon principle, it would seem that the operation of every judgment must depend on the power of the court to render that judgment; or, in other words, on its jurisdiction over the subject matter which it has determined. In some cases that jurisdiction unquestionably depends as well on the state of the thing as on the constitution of the court. If by any means whatever a prize court should be induced to condemn, as prize of war, a vessel which was never captured, it would not be contended that this condemnation operated as a change of property. Upon principle, then, it would seem that, to a certain extent, the capacity of the court to act upon the thing condemned, arising from its being within or without their jurisdiction, as well as the constitution of the court, may be considered by that tribunal, which is to decide on the effect of the sentence. Passing from principal to authority, we find, that in the courts of England, whose decisions are particularly mentioned, because we are best acquainted with them, and because, as it is believed, they give to foreign sentences as full effect as are given to them in any part of the civilized world, the position, that the sentence of a foreign court is conclusive with respect to what it professes to decide, is uniformly qualified with the limitation, that it has, in the given case, jurisdiction of the subject matter."

SEC. 181. The whole world, it is said, are parties in a prize cause, and therefore the whole world is bound by the decision. The reason on which this dictum stands will determine its extent: Every person may make himself a party and appeal from the sentence; but notice of the controversy is necessary, in order to become a party, and it is a principle of natural justice, that before the rights of an

individual be bound by a judicial sentence, he shall have notice either actual or implied, of the proceedings against him ; where the proceedings are not against the person, the notice is served on the thing itself. This is necessarily notice to all those who have any interest in the thing, and is reasonable because it is necessary, because it is the part of common prudence for all those who have any interest in it to guard that interest by persons who are in a situation to protect it. Every person, therefore, who could assert any title to "the Mary" has constructive notice of her seizure, and may be fairly considered as a party to the libel. But those who have no interest in the vessel which could be asserted in a court of admiralty, have no notice of her seizure, and can, on no principle of justice or reason, be considered as parties to the cause, so far as respects the vessel. When such person is brought before the court in which the fact is examinable, no sufficient reason is perceived from precluding him from examining it. The judgment of a court of common law, or the decree of a court of equity, would, under such circumstances, be re-examinable in a court of common law or equity ; and no reason is discerned why the sentence of a court of admiralty under the same circumstances should not be re-examinable in a court of equity. The reasoning is not at variance with the decision that the sentence of a foreign court of admiralty, condemning a vessel or cargo, as enemys' property, is conclusive in an action against the underwriters on a policy in which the property is warranted to be neutral. It is not at variance with that decision, because the question of prize is one of which the courts of law have no direct cognizance, and because the owners of the vessel and cargo were parties to the libel against them."¹ The rule in England seems to be : that the sentence of a foreign court of admiralty of competent jurisdiction, pronounced *in rem*, is conclusive against the whole world, as to the existence of the ground on which the court professes to decide, and also that unless it be a court of competent jurisdiction, its sentence, far from being conclusive, can have no effect at all. It is a well

¹ The Mary, 9 Cranch, 126.

established principle of international law that the prize court of one belligerent cannot sit in the dominions of a neutral power. "It would be a licentious attempt to exercise the rights of war within the bosom of a neutral country."¹ Accordingly to the sentence of such a tribunal, courts attribute no credit or authority whatever.²

SEC. 182. These sentences, like judgments in a court of common law, are always conclusive as to their own existence, and the legal consequences resulting therefrom. One of those consequences is that the title of the original owner to the property upon which they operate is completely extinguished and transferred to the captors or their sovereign. The English doctrine has, after much deliberation and controversy, received the deliberate sanction of many of our courts. In the supreme court of the United States, in Massachusetts, Connecticut, South Carolina and Louisiana, the sentence of a foreign court of admiralty of condemnation for a breach of blockade or as enemys' property, is conclusive evidence, as between the insured and the underwriters, if the fact upon which it is founded. "It is now too late," said Lawrence, C. J., "to examine the practice of admitting these sentences to the extent to which they have been received. Supposing that practice might at first have appeared doubtful, on the authority of those decisions, men have acted for a long series of years and entered into contracts of assurance in this country, with a knowledge of such decisions, and in expectation that the questions arising out of such contracts, to which the decisions are applicable, will be ruled by them." In Maryland, Pennsylvania, Virginia and New York, it has been reduced by statute to mere *prima facie* evidence. In New York, the sentence of condemnation is conclusive to change the property; it is only *prima facie* evidence of the facts upon which it purports to be founded, and in a collateral action, such evidence may be rebutted by showing that no such facts ever existed. A sentence of condemnation will be binding upon the right of third parties, as well as on the

¹ The Flad. Oyen, 8 T. R. 270.

² Hanelock v. Rocknook, 8 T. R. 276; Donaldson v. Thompson, 1 Camp. 429; Lothian v. Henderson, 3 B. & P. 524; Baring v. Claggett, Id. 214.

parties to the original suit; it is conclusive between the assured and the underwriter with respect to every fact which it professes to decide.¹ The sentence of a foreign prize court, though under an edict unjust in itself; contrary to the law of nations and in violation of neutral rights, is conclusive in respect to the thing itself, and works an absolute change of the property and is a valid decree because it is not examinable in other courts. The decree relates back to the capture and affirms a sale made by the captors before condemnation.² So a sentence of condemnation of property carried into the port of an ally will not be enquired into by the courts of a neutral country.³ So a sentence of condemnation of a vessel by an admiralty court for breach of blockade is conclusive of that fact in an action on the policy of insurance.⁴ But under a policy of insurance containing a warranty of neutrality, proof of which is to be required in the United States only, a foreign sentence of condemnation is not conclusive evidence of such breach of warranty,⁵ nor is it conclusive that the property was not in a neutral.⁶ A decree is equally conclusive whichever way it is pronounced. An acquittal will be as effectual in estopping those by whom the vessel has been seized from justifying their conduct on the ground that the property had incurred forfeiture as a sentence of condemnation would be in estopping the owner from averring that the seizure was illegal and that no forfeiture had occurred.⁷ A sentence of condemnation completely extinguishes the title of the original owner and transfers a rightful title to the captor or his sovereign. So a decree of condemnation for the breach of a municipal regulation is valid though the vessel be lying in the port of a neutral friendly power.⁸ But while all foreign judgments *in rem* are conclusive they are

¹ Foster v. Ogle, 1 Camp. 418; Crousdon v. Leonard, 4 Cr. 434.

² Williams v. Amroyd, 7 Cranch, 423.

³ Sheaf v. The Betsey, B. R. 163.

⁴ Crousdon v. Leonard, 4 Cranch, 434; Bradstreet v. Neptune Ins. Co. 3 Sumner, 600; Amroyd v. Williams, 2 W. C. C. 508; S. C. 7 Cranch, 423.

⁵ Maryland Ins. Co. v. Woods, 6 Cranch, 29.

⁶ Mally v. Shattuck, 3 Cranch, 458; Fitzsimmons v. Newport Ins. Co. 4 C. R. 185.

⁷ The Star, 3 Wheaton, 78.

⁸ Hudson v. Guertler, 4 Cr. 293.

so far examinable as to ascertain whether the tribunal had jurisdiction of the subject matter consistently with the law of nations.¹

SEC. 183. The judicial acts of one nation are to be respected by another and are conclusive on the subjects of the other relative to all matters within the national jurisdiction, but in order to render them conclusive it is further necessary that they should be matters cognizable by the court and fairly decided. The sentence of a foreign court or competent jurisdiction acting *in rem*, is conclusive in respect to the matter on which it directly decides. If, however, the proceedings are not merely irregular and illegal but were founded in fraud they are not conclusive and this may be shown *aliunde*. In order to make the sentence conclusive it must appear that there have been proper judicial proceedings with some personal or public notice to the parties. A judgment of condemnation by a foreign tribunal not properly constituted is not only of no effect as an estoppel in another action but is a mere nullity; but the presumption is that it is properly constituted unless the constitution of it be known. All sentences of foreign courts of admiralty condemning goods as enemys' property are *prima facie* evidence of such fact, but may be invalidated by the evidence contained in the record itself. Concealment of facts afford no ground to avoid a sentence of a foreign court acting *in rem*, but where a foreign court not of admiralty has decided a case possessedly but erroneously on our law, our courts are not concluded by such a decision.

SEC. 184. Judgments *in rem* being conclusive upon the thing itself in the *forum* where they originate, they will continue to be so in any foreign tribunal in which they are called in question.² When a judgment is founded on the ground that the goods are enemys' property, it is conclusive that the property belongs to the enemies not only for the immediate purpose of such sentence, but it is binding

¹ Rose v. Himely, 4 Cranch, 244; S. C. Bee, 300; Bradstreet v. Nep. Ins. Co. 3 Sumner, 600.

² Burnham v. Webster, 2 W. & M. 172.

on all courts and all persons,¹ and the sentence is binding whether it proceeds to condemn the ship expressly as being enemys' property, or whether such a ground of decision can only be collected from other parts of the proceedings.² Whenever the matter in controversy is land or other immovable property, the judgment pronounced in the *forum rei sitæ* is held to be of universal obligation as to all the matters of the right and title which it professes to decide in relation thereto, it is necessarily beyond the reach of revision by foreign tribunals when originally pronounced. This results from the very nature of the case, for no other court can have a competent jurisdiction to inquire into or settle such right or title. By the general consent of nations therefore in case of immovables the judgment of the *forum rei sitæ* is held absolutely conclusive. "*Immobilia ejus jurisdictionis esse reputantur ubi sita sunt* while the converse is also well settled that a judgment in any foreign country touching such immovables is of no obligation whatever.³

SEC. 185. The same principles, observes Mr. Justice Story, is applied to all other cases of proceedings *in rem*, where the subject is movable property within the jurisdiction of the court pronouncing the judgment. Whatever the court settles as to the right or title, or whatever disposition it makes of the property by sale, revendication, transfer, or other act, will be held valid in every other country where the same question comes directly or indirectly in judgment before any other foreign tribunal. This is very familiarly known in the cases of proceedings *in rem* in foreign courts of admiralty, whether they are causes of prize, or of bottomry, or of salvage, or of forfeiture, or of any of the like nature, over which such courts have a rightful jurisdiction founded on the actual or constructive possession of the subject matter. The same rule is applied to other courts proceeding *in rem*, such as the Court of Exchequer in England,

¹ Kindersly v. Chase, 2 Park Ins. 743; Graham v. Maxwell, 2 Dow, 314; Hamilton v. Dutch Ins. Co. 264.

² Bolton v. Gladston, 5 East, 155, 99.

³ Story's Confl. of Laws, § 591.

and to all courts exercising a like jurisdiction *in rem* upon seizure. And in cases of this sort it is wholly immaterial whether the judgment be of acquittal or of condemnation. In both cases it is equally conclusive.¹ But the doctrine of conclusiveness, however, is always to be understood with this limitation, that the judgment has been obtained *bona fide* and without fraud; for if fraud is shown, it will avoid the force and validity of the sentence.² So it must appear that there have been regular proceedings upon which to found the judgment or decree; and that the parties in interest *in rem* have had notice, or an opportunity to appear and defend their interest, either personally, or by their proper representative, before it was pronounced; for the common justice of all nations requires that no condemnation should be pronounced before the party has an opportunity to be heard.³ The sentence of a foreign court will not be conclusive under the following circumstances: 1st. If a foreign sentence of condemnation as prize, is manifestly erroneous, as if it professes to be made on particular grounds, which are set forth, but which plainly do not warrant the decree, the sentence will not be conclusive as to such facts. 2d. Or on grounds contrary to the law of nations. 3d. Or if there be any ambiguity as to what was the ground of condemnation.⁴ 4th. If the foreign court is constituted by persons interested in the matter in dispute, the judgment is not binding.⁵ Sentences of condemnation of foreign courts of prize are conclusive, only where such courts are constituted according to the law of nations; and exercised either in the bellig-

¹ Croudson v. Leonard, 4 Cranch, 423; William v. Armroyd, 7 Cranch, 423; Rose v. Himely, 4 Cranch, 241; Hudson v. Guestier, 4 Cranch, 293; The Mary, 9 Cranch, 126; 1 Stark Ev. p. 246; Marshall on Insur. ch. 9, § 6, p. 412; Grant v. McLachlin, 4 Johns. 34; Peters v. Warren Ins. Co. 3 Sumner, 389; Bland v. Bamfield, 3 Swanst. 604; Bradstreet v. Neptune Insur. Co. 3 Sumner, 600; Magoun v. New England Insur. Co., 1 Story R. 157.

² The Duchess of Kingston's Case, 20 Howell, State Trials, 355; Bradstreet v. The Neptune Insurance Co., 3 Sumner, 600; Magoun v. The New England Insurance Co., 1 Story, 157.

³ Calvert v. Bovil, 7 T. R. 523; Pallard v. Bell, 8 T. R. 444.

⁴ Dalgleish v. Hodgson, Bing. 495.

⁵ Price v. Dewhurst, 8 Sim. 279; Sawyer v. Maine Fire and Mar. Insur. Co., 12 Mass. 261; Bradstreet v. The Neptune Insur. Co., 3 Sumner, 600; Magoun v. N. England Ins. Co., 1 Story, R. 157.

erent country, or in the country of a co-belligerent or ally in the war.¹ A sentence of condemnation, pronounced by the authority of the capturing power, within the dominions of neutral territory, to which the prize may be taken, is illegal² and therefore is not even admissible as evidence to falsify the warrant of neutrality. Every foreign admiralty sentence depends for its operation upon the jurisdiction of the court pronouncing it. If jurisdiction is lacking, all is lacking, and the proceedings are utterly null and void.³ Any tribunal before whom such a sentence is sought to be used has the right of examining freely, into the matter, and deciding whether the foreign tribunal which rendered the sentence had jurisdiction or not? Jurisdiction may depend upon the state of the *res*, on which the decree was intended to operate, if for instance: If a prize court should be induced to condemn as prize of war, a vessel which was never captured, such a condemnation as that would certainly not transfer any property; so if the prize courts should lose possession, as by recapture, voluntary discharge or escape, the prize courts of the captor would thereby lose jurisdiction. But if the captor has possession of the *res* in a neutral port, the port of an ally, or of a nation under control of the sovereign, and the *res* though remaining there as within the jurisdiction of the court of the captor. The jurisdiction of a prize court may depend upon its natural character; the prize court of an ally of the captor has no right to condemn, and the court of a neutral cannot; it may also depend upon the place where the court sits, it cannot act in neutral territory, if it does the proceedings are void.⁴ But it may sit in the territory of an ally. An appeal from a sentence of a prize or admiralty court prevents it having the force and effect of *res judicata*, and as long as the appeal is undetermined the decree proves nothing.

SEC. 186. Proceedings also by creditors against the personal property of the debtor, in the hands of third persons,

¹ Oddy v. Bovil, 2 East, 473.

² Havelock v. Rockwoods, 8 T. R. 268; Donaldson v. Thompson, 1 Camp. 429.

³ Rose v. Himley, 4 Cranch, 241.

⁴ Hudson v. Guestier, 4 Cranch, 293.

or against debts due to him by such third persons (commonly called the process of foreign attachments, or garnishment, or trustee process,) are in some sense proceedings *in rem*, and are deemed entitled to the same consideration. But in this class of cases it must be especially understood that to make any judgment effectual, the court must possess and exercise a rightful jurisdiction over the *Res*, and also over the person; at least, so far as the *Res* is concerned; otherwise it will be disregarded. And if the jurisdiction over the *Res* be well founded, but not over the person except as to the *Res*, the judgment will not be either conclusive or binding upon the party *in personam*, although it may be *in rem*. In all these cases the same principle prevails, that the judgment acting *in rem* shall be held conclusive upon the title, and the transfer and disposition of the property itself, in whatever place the same property may afterwards be found, and by whomsoever the latter may be questioned; and whether it be directly or incidentally brought in question.¹ In these cases, as in cases of judgments *in rem* in our own courts, the judgment is conclusive upon the title, transfer and disposition of the *Res*, wherever it may afterwards be found, and by whomsoever questioned, whether directly or incidentally brought in question.

SEC. 187. Foreign judgments *in personam*, differ somewhat in their conclusive effect from those we have just disposed of. The principle that, that which has been once settled by litigation shall not again be litigated applies to some extent to foreign judgments. A question settled abroad by courts of competent jurisdiction between actual parties, after trial, will not be subject to any further litigation between the same parties. The presumption naturally arises that all the defences which the losing party has, were made and were unavailable. "*Interest reipublicae res judicatus non rescindi.*" But to this principle of conclusiveness there is a limitation, which applies to all foreign judgments, that when a foreign law or foreign process on which the judgment is founded conflicts with reason and justice, or

¹ Story's Conflict of Laws, § 592.

that the foreign court rendering the judgment depended upon the law of the country in which the judgment is questioned or comes into consideration is found to have been rendered upon a mistaken view of the law, and also, on another ground when it is obtained or founded on fraud. "There is a distinction commonly taken between actions brought by parties to enforce a foreign judgment and one brought against a party who sets up a foreign judgment in bar of a suit by way of defence. In the former case, the sovereign acts upon the principles of comity; and has therefore a right to prescribe the terms and limits of that comity. But is otherwise in the latter case, where the judgment is set up as a bar to the proceedings; for if it has been pronounced by a competent tribunal, and carried into effect, the losing party has no right to institute a new suit elsewhere and thus bring the matter again into controversy; and the successful party is not to lose the protection which the foreign judgment gave him. It is then *res adjudicata*, which had ought to be received, as conclusive evidence of right, and the *exceptio rei judicatae* under such circumstances is entitled to universal conclusiveness and respect. This distinction is recognized as having its foundation in international justice.¹ A foreign judgment is not conclusive in an action here involving the same subject matter, but the jurisdiction of the foreign court, its power over the parties, and the matters in controversy, may be inquired into; and it may be impeached for fraud, but if it is not impeached it is conclusive, and it is conclusive to show by way of defence that the subject matter has once passed *in rem judicatum*.² Justice Story in his conflict of laws says: In regard to *judgments in personam* which are sought to be enforced by a suit in a foreign tribunal. There has certainly been no inconsiderable fluctuation of opinion in the English courts upon this subject. It is admitted on all sides that in such

¹ Story on Conflict of Laws, § 598; 2 Kent, 119.

² Rankin v. Goddard, 54 Maine, 28 S. C. 55 Maine, 389; Barney v. Paterson, 6 Har. & Johns. 182; James Allen 1 Dall. 188; Thompson v. Toltmie, 4 Johns. Ch. 460; Embree v. Hamon, 5 Ib. 101; Bissell v. Briggs, 9 Mass. 462; Hosmer v. Parker, 3 Mason, 247; Crousden v. Leonard, 4 Cranch, 434; Smith v. Lewis, 3 Johns. 168, 8 Cowan, 311.

cases, the foreign judgments are *prima facie* evidence to sustain the action, and are to be deemed right until the contrary is established ; they may be avoided if they are founded in fraud or are pronounced by a court not having any competent jurisdiction over the cause. But the question is whether they are not deemed conclusive ; or whether the defendant is at liberty to go at large into the original merits, to show that the judgment ought to have been different upon the merits, although obtained *bona fide*. If the latter course be the correct one, then a still more embarrassing consideration is, to what extent, and in what manner the original merits can be properly inquired into. But though there remains no inconsiderable diversity of opinion among the learned judges of the different tribunals, the English courts however sustain the conclusiveness of foreign judgments.

SEC. 188. The general doctrine of American courts maintain that when a foreign judgment comes incidentally in question, as where it is the foundation of a right or title derived under it, and the like, it is conclusive. But if a foreign judgment proceeds upon an error in law, apparent upon the face of it, it may be impeached every where, as if an English court professing to decide according to the law of New York, clearly mistakes it.¹ There can be but little doubt but that payments made, powers exercised, or sales effected, or other final acts accomplished, under the direction of a foreign tribunal, may be valid, when the decree under which they take place is erroneous or even void.² Thus a payment by a garnishee, in obedience to an order of the court, by which he has been attached, will be a bar in any subsequent suit against him for the debt, whether the proceedings took place in a domestic or foreign tribunal ; whether they were or were not conclusive as regards other parties to the action, for the simple reason that a payment made in good faith and by compulsion of law, exonerates the person who makes it from all further responsibility, and remits those entitled to the fund to an action against the

¹ *Nouvelli v. Rossi*, 2 B. & Ad. 757.

² *Barber v. Lamb*, 8 C. B. N. S. 95.

person by whom it has been received.¹ Whenever a foreign judgment comes *incidentally* in question it is as conclusive as where it is used as the foundation of a title derived under it, or to show that the subject matter of the action has once passed *in rem judicatum*, or is introduced by a guarantor as a defence in order to show that his principal was not liable or is relied on by the garnishee in a foreign attachment, for the purpose of protecting himself against the claims of his original creditors or by the underwriter, in a policy of insurance, to show a breach of warranty on the part of the insured, in an action upon the policy or by a party to justify himself for acts done in virtue of it. But whenever a judgment is rendered without jurisdiction it is void, and is treated as a nullity whether it comes directly or collaterally in question. But a foreign judgment will not be an estoppel in this country, if it does not appear to be final and conclusive as an estoppel in the country where it was pronounced. In *Buchanan v. Rucker*.² Lord Ellenborough said there might be such glaring injustice on the face of a foreign judgment, or it might have a vice rendering it so ludicrous that it could not raise an assumption, and if submitted to the courts of this country could not be enforced. In the case of *Rice v. Denhurst*, 8 Sim. 279, the Vice-Chancellor said: "Whenever it is manifest that justice has been disregarded, and that the parties are merely making use of the legal proceedings as a matter of form, for the purpose of doing that which is contrary to all notions of justice, namely, of deciding for themselves and in their own favor, the court is bound to treat their decision as a matter of no value or substance;" and if a judgment is rendered against a defendant who, it appears, has not been served with process, nor had any opportunity of defending the action, such a judgment would not be enforced by any court.

SEC. 189. A decree of a court of chancery in England, dismissing a bill filed by an administrator against an executor, is no bar to a like suit in the United States, between

¹ Bissell v. Briggs, 9 Mass. 462; Taylor v. Phelps, 1 Harris & Gill, 492.

² Campb. 67.

the same parties upon the same title with respect to American assets.¹ An adjudication upon the title to land by a tribunal acting under the sovereign authority of the state where the land is necessarily situated is from the nature of the action beyond the reach of revision by foreign tribunals when originally pronounced,² and will continue so though the land be turned into money and the proceeds taken within the jurisdiction of the courts of another country.³ No judicial decision can be valid unless the court has the authority necessary for the determination of the cause and the parties are subject to the authority of the court. The obligations of foreign judgments is founded solely upon comity and are held strictly to those principles of natural justice and international law in which that comity has its origin.⁴ A judgment rendered *in personam* in one sovereignty may always be successfully disputed in another by showing that the party was not amenable to the authority of the court, if he was the court did not take the proper steps to exercise its authority over his person by the service of process or giving him notice of the tendency of the action and the necessity of coming forward to make a defence.

SEC. 190. In regard to marriages, the general principle is, that between persons *sui juris*, marriage is to be decided by the law of the place where it is celebrated. If valid there, it is valid everywhere. It has a legal ubiquity of obligation. If invalid there, it is invalid everywhere.⁵ The most prominent, if not the only known exceptions to this rule, are marriages involving polygamy and incest; those prohibited by the public law of a country from motives of policy; and those celebrated in foreign countries by subjects entitling themselves, under special circumstances, to the benefit of the laws of their own country.⁶ As to sentences confirming marriages, some English jurists seem disposed to concur with

¹ Apsden v. Nixon, 4 Howard, 467.

² Story's Conflict Laws, § 463.

³ Monroe v. Douglass, 4 Sandford ch. 126.

⁴ Moslin v. Trenton Insurance Co., 4 Zabriske 222.

⁵ Story's Conf. Laws, § 499, 504, 594; Morrell v. Dickey, 1 John. Ch. 153; Kraft v. Wickey, 4 G. & J. 332; Dixon v. Ramsay, 3 Cranch, 319.

⁶ Story's Conf. Laws, § 80, 81, 113.

those of Scotland and America, in giving to them the same conclusiveness, force, and effect. If it were not so, as Lord Hardwicke observed, the rights of mankind would be very precarious. But others, conceding that a judgment of a third country, on the validity of a marriage not within its territories, nor had between subjects of that country, would be entitled to credit and attention, deny that it would be universally binding.¹

SEC. 191. In the United States, a sentence of divorce, obtained *bona fide* and without fraud, pronounced between parties actually domiciled in the country, whether natives or foreigners, by a competent tribunal having jurisdiction over the case, is valid if valid in the state where it is rendered, and is a complete dissolution of the marriage in whatever country it may have been originally celebrated.²

SEC. 192. The first section of the fourth article of the constitution of the United States declares that "full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. The language, says Mr. Justice Story,³ "is positive and declaratory and imports that it is intended to give them a more conclusive efficiency than foreign judgments of tribunals outside of the United States, and that they shall be as conclusive as domestic judgments. If the jurisdiction of the court be established, the judgment shall be conclusive as to its merits. By the long established rules of common law, both in England and America, foreign judgments were *prima facie* evidence of their own correctness. They might be impugned for their injustice or irregularity; but they were admitted to be a good ground of action here, and stood firm until impeached and overthrown by competent evidence, introduced by the adverse party. It is hardly conceivable, that so much solicitude should have been exhibited to introduce, as between confederated states, much less between states united under the same national government, a clause nearly affirm-

¹ Roach v. Garvan, 1 Ves. 157 ; Story's Conf. Laws, § 595, 596 ; Sinclair v. Sinclair, 1 Hagg. Consist. R. 297 ; Scrimshire v. Scrimshire, 2 Hagg. Consist. R. 395.

² Story's Conf. Laws, § 597 ; Cheever v. Wilson, 9 Wallace, 108 ; Dorsey v. Dorsey, 7 Watts, 350.

³ Story's Commentaries on the Constitution, § 1297-1307.

ative of an established rule of law, and not denied to the humblest or most distant foreign nation. It was hardly supposable, that the states would deal less favorably with each other on such a subject, where they could not but have a common interest, than with foreigners. A motive of a higher kind must have directed them to the provision. It must have been "to form a more perfect union," and to give to each state a higher security and confidence in the others, by attributing a superior sanctity and conclusiveness to the public acts and judicial proceedings in all. There could be no objection to such a course—but many reasons in its favor. The states were united in an indissoluble bond with each other. The commercial and other intercourse with each other would be consistent and infinitively diversified. Credit would be everywhere given and received, and rights and property would belong to citizens of every state, in many other states than that in which they resided. Under such circumstances it could scarcely consist with the peace of society, or with the interest and security of individuals, with the public or with private good; that questions and titles, once deliberately tried in one state, should be open to litigation again and again, as often as either of the parties or their privies, should remove from one jurisdiction to another. It would occasion infinite injustice, after such trial and decision again to open and re-examine all the merits of the case. It might be done at a distance from the original place of the transaction, after the removal or death of the witness, or the loss of other testimony; after a long lapse of time, and under circumstances wholly unfavorable to a just understanding of the case."

SEC. 193. It might be said, that the judgment was unjust upon the merit, or erroneous in point of law. If this was true, it would furnish no ground for interference; for the evils of a new trial would be greater than the cure. Every such judgment ought to be presumed to be correct, and founded in justice. And what security is there, that the new judgment, upon the re-examination, would be more just, or more conformable to the law, than the first. What state has a right to proclaim that the judgments of its own

courts are better founded in law and justice than those of any other state. The evils of introducing a general system of re-examination of the judicial proceedings of other states, whose connections are so intimate, and whose rights are so interwoven with our own, would far outweigh any supposable benefits from an imagined superior justice in a few cases. Such must have been the motives of the framers of the Constitution of the United States. They not only intended to give faith and credit to the public acts, records and judicial proceedings of each of the states, such as belonged to those of foreign nations and tribunals, but to give them full faith and credit, that is, to attribute to them positive and absolute verity, so that they cannot be contradicted, or the truth of them be denied, any more than in the state where they originated. The act of May 26th, 1790, ch. 39, has declared that the said record and judicial proceedings authenticated as by the act provided shall have such faith and credit given them in every court within the United States as they have by law or usage in the courts of the state from whence such records are or shall be taken, so that when such records are authenticated as the law provides, it gives them the same faith and credit as they have in the state from which they are taken. If a judgment is conclusive in the state where it is pronounced, it is equally conclusive every where. If re-examinable there, it is open to the same inquiries in every other state. It is therefore put on the footing of a domestic judgment. But this does not prevent an inquiry into the jurisdiction of the court, in which the original judgment was given to pronounce it, or the right of the state itself to exercise authority over the person or subject matter.

SEC. 194. Therefore, by the constitution and laws of the Congress of the United States, the judicial determinations, such as judgments, sentences and decrees of the various sister states of the United States, are invested with the same force and effect in every other state as they have in that in which they are rendered, and they not only operate by way of estoppel, but by way of merger to suits brought upon the original cause of action, but they must be declared on in debt as obliga-

tion of record, and not in *assumpsit*. They have all the presumptions in their favor which exist and are accorded in the case of domestic judgments, and are absolutely conclusive of the facts and the law, unless it is shown that the tribunal in which they were rendered exceeded its powers in taking cognizance of the cause, or that the parties were not subject to the jurisdiction of the court, and a judgment may be impeached in another state by showing that the tribunal lacked the necessary jurisdiction to render it, or that the notice which natural justice and the principles of jurisprudence require, were not extended or given to the defendant; and the want of notice may not only be shown by proof *aliunde*, when the record is silent as to that matter, but in opposition and contradiction to its averment.

SEC. 195. But a judgment of a state court has this conclusive effect, though the suit was commenced by attachment, if the defendant appeared and took part in the defence. So if a corporation, chartered in one state, is allowed to transact business in another, on condition that service of process on its agent shall be deemed service upon the corporation itself; a judgment thus obtained is entitled to the same faith and credit in the former state as in the latter.¹ But it has the force and effect of a domestic judgment in another state, only so far that it estops all inquiry into the subject matter, subject to the qualification that they are open to inquiry as to the jurisdiction of the court which rendered them, as to notice to the defendant. The judgment of a state court, not reversed by a superior court having jurisdiction, nor set aside by a direct proceeding in chancery, is conclusive in all the courts of the other states where the subject matter of controversy is the same.²

SEC. 196. The Supreme court of the United States, upon the question of the conclusiveness of judgment of other states, said: Article four, section one, of the Constitution, provides that, "full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other

¹ *Lafayette Ins. Co. v. French*, 18 Howard, 404.

² *Christmas v. Russell*, 5 Wall, 291.

state. And the Congress may, by general laws, prescribe the manner in which such records shall be proved, and the effect thereof." Congress has exercised that power and in effect provided that the judicial records in one state shall be proved in the tribunals of another, by the attestation of the clerk under the seal of the court, with the certificate of the judge that the attestation is in due form. That such records so authenticated "shall have such faith and credit given to them in every court in the United States as they have by law or usage in the courts of the state from which the said records were or shall be taken."¹ When the question of the construction of that act of Congress was first presented to this court, it was argued that the act provided only for the admission of such records as evidence, that it did not declare their effect; but the court refused to adopt the proposition, and held that the act expressly declares, that the record, when duly authenticated, shall have in every other court of the United States the same faith and credit as it has in the state court from whence it was taken.² Repeated decisions made since that time have affirmed the same rule, which is applicable in all similar cases where it appears that the court had jurisdiction of the cause and that the defendant was duly served with process or appeared and made defence.³ Where the jurisdiction has attached the judgment is conclusive for all purposes, and is not open to any inquiry upon the merits.⁴ Speaking of the before mentioned act of Congress, Judge Story says: it has been settled upon solemn argument, that that enactment does declare the effect of the records as evidence when duly authenticated. . . . "If a judgment is conclusive in the state where it is pronounced, it is equally conclusive everywhere" in the courts of the United States.⁵ Applying these rules to the present case

¹ Stat. at Large, 122; *D'Arcy v. Ketchum*, et. al., 11 Howard, 175.

² *Mills v. Duryee*, 7 Cranch, 483.

³ *Hampton v. McConnell*, 3 Wheaton, 332; *Nations et al. v. Johnson et al.*, 24 Howard, 203; *D'Arcy v. Ketchum*, 11 Id. 165; *Webster v. Reed*, Id. 460.

⁴ *Bissell v. Briggs*, 9 Massachusetts, 462; *United States Bank v. Merchants' Bank*, 7 Gill. 430.

⁵ 2 Story on Constitution, (3d ed.), § 1313.

it is clear that the statute which is the foundation of the second plea in this case is unconstitutional and void as affecting the right of the plaintiff to enforce the judgment mentioned in the declaration. Beyond all doubt the judgment was valid in Kentucky and conclusive between the parties in all her tribunals. Such was the decision of the highest court in the state, and it was undoubtedly correct; and if so, it is not competent for any other state to authorize its courts to open the merits and review the cause, much less to enact that such a judgment shall not receive the same faith and credit that by law it had in the state courts from which it was taken. Second error assigned is that the court erred in sustaining the demurrer to the fourth plea, which alleged that the judgment was procured by the fraud of the plaintiff. First proposition assumed by the present defendant is, that the plea is defective and insufficient, because it does not set forth the particular acts of the plaintiff which are the subject of complaint. But the substance of the plea, if allowable at all, is well enough under general demurrer, as in this case. Whether general or special, a demurrer admits all such matters of fact as are sufficiently pleaded, and to that extent it is a direct admission that the facts as alleged are true.¹ Where the objection is to matter of substance, a general demurrer is sufficient; but where it is to matter of form only, a special demurrer is necessary. Demurrers, says: Chitty, are either general or special: general, when no particular cause is alleged; special, when the particular imperfection is pointed out and insisted upon as the ground of demurrer. The former will suffice when the pleading is defective in substance, and the latter is requisite where the objection is only to the form of the pleading.² Obviously the objection is to the form of the plea and is not well taken by a general demurrer. But the second objection is evidently to the substance of the plea, and therefore is properly before the court for decision. Substance of the second objection of the present defendant to the fourth plea is, that inasmuch as the

¹ Nowlan v. Geddes, 1 East, 634; Gundry v. Feltham, 1 Term, 334; Stephen on Pleading, 142.

² Chitty's Pleading, 663; Snyder v. Croy, 2 Johnson, 428.

judgment is conclusive between the parties in the state where it was rendered, it is equally so in every court in the United States, and consequently that the plea of fraud in procuring the judgment is not a legal answer to the declaration. Principal question in the case of *Mills v. Duryee* was whether *nil debet* was a good plea to an action founded on a judgment of another state. Much consideration was given to the case, and the decision was that the record of a state court, duly authenticated under the act of Congress, must have in every other court of the United States such faith and credit as it had in the state court from whence it was taken, and that *nil debet* was not a good plea to such an action. Congress, say the court have declared the effect of the record by declaring what faith and credit shall be given to it, adopting the language of the court in that case, we say that the defendant had full notice of the suit, and it is beyond all doubt that the judgment of the court was conclusive upon the parties in that state. "It must therefore, be conclusive here also," unless the merits are open to exception and trial between the parties, it is difficult to see how the plea of fraud can be admitted as an answer to the action.

SEC. 197. Domestic judgments, under the rules of the common law, could not be collaterally impeached or called in question if rendered in a court of competent jurisdiction. It could only be done directly by writ of error, petition for new trial or bill in Chancery. Third persons only, says Saunders, could set up the defense of fraud or collusion, and not the parties to the record, whose only relief was in equity, except in the case of a judgment obtained on a *cognovit* or a warrant of attorney.¹ Common law rules placed foreign judgments upon a different footing, and those rules remain, as a general remark, unchanged to the present time. Under these rules a foreign judgment was *prima facie* evidence of the debt, and it was open to examination not only to show that the court in which it was rendered had no jurisdiction of the subject-matter, but also to show that the judgment was fraudulently obtained.

¹ 2 Saunders on Pleading and Evidence, part 1, p. 63.

Recent decisions, however, in the parent country, hold, that even a foreign judgment is so far conclusive upon a defendant that he is prevented from alleging that the premises upon which it is founded were never made or were obtained by fraud of the plaintiff.¹ Cases may be found in which it is held that the judgment of a state court, when introduced as evidence in the tribunals of another state, are to be regarded in all respects as domestic judgments. On the other hand another class of cases might be cited in which it is held that such judgments in the courts of another state are foreign judgments, and that as such the judgment is open to every inquiry to which other foreign judgments may be subjected under the rules of the common law. Neither class of these decisions is quite correct. They certainly are not foreign judgments under the constitution and laws of Congress in any proper sense, because they "shall have such faith and credit given to them in every other court within the United States as they have by law or usage in the courts of the state from whence" they were taken, nor are they domestic judgments in every sense, because they are not the proper foundation of final process, except in the state where they were rendered. Besides, they are open to inquiry as to the jurisdiction of the court and notice to the defendant; but in all other respects they have the same faith and credit as domestic judgments.² Subject to those qualifications, the judgment of a state court is conclusive in the courts of all the other states wherever the same matter is brought in controversy. The established rule is, that so long as the judgment remains in force it is of itself conclusive of the right of the plaintiff to the thing adjudged in his favor, and gives him a right to process, mesne or final, as the case may be, to execute the judgment.³ Exactly the same point was decided in the case of *Benton v. Burgot*, which, in all respects, was substantially like the present case.⁴ The action was debt on judgment

¹ *Bank of Australasia vs. Nias*, 4 English Law and Equity, 252.

² *D'Arey v. Ketchum*, 11 Howard, 165; *Webster v. Reid*, Id. 437.

³ *Voorhees v. United States Bank*, 10 Peters, 449; *Huff v. Hutchinson*, 14 Howard, 588.

⁴ 10 Sergeant and Rawle, 240.

recovered in a court of another state, and the defendant appeared and pleaded *nil debet*, and that the judgment was obtained by fraud, imposition, and mistake, and without consideration. Plaintiff demurred to those pleas, and the court of original jurisdiction gave judgment for the defendant. Whereupon the plaintiff brought error, and the Supreme Court of the state, after full argument, reversed the judgment and directed judgment for the plaintiff. Domestic judgments say the Supreme Court of Maine, even if fraudulently obtained, must nevertheless be considered as conclusive until reversed or set aside.¹ The settled rule, also, in the Supreme Court of Ohio, is that the judgment of another state, rendered in a case in which the court had jurisdiction, has all the force in that state of a domestic judgment, and that the plea of fraud is not available as an answer to an action on the judgment. The express decision of the court is, that such a judgment can only be impeached by a direct proceeding in chancery.²

SEC. 198. Similar decisions have been made in the Supreme Court of Massachusetts, and it is there held that a party to a judgment cannot be permitted in equity, any more than at law, collaterally to impeach it on the ground of mistake or fraud, when it is offered in evidence against him in support of the title which was in issue in the cause in which it was recovered.³ The whole current of decisions upon the subject in that state seems to recognize the principle that when a cause of action has been instituted in a proper forum, where all matters of defense were open to the party sued, the judgment is conclusive until reversed by a superior court having jurisdiction of the cause, or until the same is set aside by a direct proceeding in chancery.⁴ State judgments, in courts of competent jurisdiction, are also held by the Supreme Court of Vermont, to be conclusive as between the parties until the same are reversed or in some manner set aside and annulled. Strangers, say the court, may show

¹ Granger v. Clark, 22 Maine, 130.

² Anderson v. Anderson. 8 Ohio, 108.

³ B. & W. Railroad v. Sparhawk, 1 Allen, 448 ; Homer v. Fisk, 1 Pick. 435.

⁴ McRae v. Mattoon, 13 Pickering, 57.

that they were collusive or fraudulent; but they bind parties and privies.¹ Redfield, Ch. J., said, in the case of *Hammond v. Wilder*,² that there was no case in which the judgment of a court of record of general jurisdiction had been held void, unless for a defect of jurisdiction. Less uniformity exists in the reported decisions upon the subject in the courts of New York, but all those of recent date are to the same effect; the case of *Embury v. Conner*,³ and it is clear that the same doctrine is acknowledged and enforced. Indeed, the court, in effect, say that the rule is undeniable, that the judgment or decree of a court possessing competent jurisdiction is final, not only as to the subject thereby determined, but as to every other matter which the parties might have litigated in the cause, and which they might have decided.⁴ The same rule prevails in the courts of New Hampshire, Rhode Island and Connecticut, and in most of the other states.⁵ The decision of the highest court of a state, that an act of the state is not in conflict with a provision in its constitution, is conclusive upon the Supreme Court of the United States.⁶

SEC. 199. In the United States the rights and powers of guardians are considered as strictly local; and no guardian is admitted to have any right to receive the profits, or to assume the possession of the real estate, or to control the person of his ward, or to maintain any action for the personalty out of the states under whose authority he was appointed, without having received a due appointment from the proper authority of the state within which the property is situated, or the act is to be done, or to whose tribunals resort is to be had. The same rule is also applied to the case of executors and administrators.

§ SEC. 200. A judgment of the supreme court or a circuit

¹ *Atkinsons v. Allen*, 12 Vermont, 624.

² 23 Vermont, 346.

³ 3 New York Court of Appeals, 522.

⁴ *Dobson v. Pearce*, 12 N. Y. 165.

⁵ *Hollister v. Abbott*, 31 N. H. 448; *Rathbone v. Terry*, 1 Rhode Island, 77; *Topp v. The Bank*, 2 Swan, 188; *Wall v. Wall*, 28 Mississippi, 413.

⁶ *Gut v. State*, 9 Wall, 35; *Randall v. Bingham*, 7 Ib. 451; *Provident Ins. v. Massachusetts*, 6 Ib. 630.

court of the United States when offered in evidence in a state court, is regarded as a domestic and not as a foreign judgment. In Texas, a judgment rendered in another state against a defendant in his lifetime, is not only sufficient, after his decease, to support an action against his personal representative in that state, but must, if not reversed or annulled, be held conclusive of all matters therein adjudicated unless it be void for fraud.¹ So if the record show that the defendant appeared by attorney the judgment cannot be questioned in a collateral proceeding,² and it merges and extinguishes the original cause of action.³ The plea of *nil debet* is inadmissible, in an action on a judgment of the court of another state; no plea can be received that would be bad in the state where the original judgment was obtained. But a plea of *nul tiel* record is the only plea allowed, and under it the defendant may show that it was obtained by fraud, or that the action was commenced by attachment without personal service, or he was not served with process within the jurisdiction of the court, or that the court had no jurisdiction over the subject matter. But payment cannot be proved under *nul tiel* record.⁴ In the case of *Mills v. Duryee*, the supreme court settled the question that *nil debet* is not a good plea to an action founded on a judgment of another state. If the judgment is inconclusive in the state in which it was rendered, or if it is enquirable into these during a particular period and on certain conditions, it will be open to the same extent everywhere else.⁵

SEC. 201. Unless a court has jurisdiction it can never make a record, which imports uncontrollable verity to the party over whom it has usurped jurisdiction, and he ought not therefore to be estopped by any allegation in that record from proving any fact that goes to establish the truth of the plea, alleging want of jurisdiction. So long as the

¹ *Cherry v. Speight*, 28 Tex. 503.

² *Sanders v. Brant*, 10 Howard, 348; *Fiele v. Gibbs*, 1 Pet. C. C. R. 155.

³ *Green v. Sarmiento*, 1 Pet. C. C. R. 74.

⁴ *Trustall v. Robinson*, Kempe, 229.

⁵ *Baugh v. Baugh*, 4 Bibb, 556; *Green v. Sarmiento*, 1 Pet. C. C. 74; *Curtis v. Gibbs*, 1st Pen. 399; *Rogers v. Coleman*, 1 Hardin, 20; *Wemway v. Pauling*, 5 Har. & J. 500; *Spencer v. Sloan*, 8 Louisiana, 290.

question of jurisdiction is in issue, the judgment of a court of another state, is in its effect like a foreign judgment; it is *prima facie* evidence, but for all the purposes of sustaining that issue, it is examinable into to the same extent as a judgment rendered by a foreign court. If the jurisdiction of the court is not impeached, it has the character of a record, and for all purposes is received with full faith and credit. The rule is the same with any judgment, sentence or decree. A want of jurisdiction in the court pronouncing it may always be set up, when it is sought to be enforced, or when any benefit is claimed under it, and the principle which ordinarily forbids the impeachment or contradiction of a record has no sort of application to the case.

Among the numerous cases arising upon judgments of other states, there has been a vast amount of enquiry and argument as to what kind of judgments were included within that article of the constitution, and the laws of the United States. In Massachusetts it is held to apply to civil actions and not criminal ones.¹ While in North Carolina the direct converse of this was held.² In New Hampshire³ it is held that the judgment of a Justice of the Peace cannot be properly authenticated as required by act of Congress, and is placed on the same basis as foreign judgments, while in the case of *Warren v. Flagg*,⁴ the supreme court of Massachusetts said, "certainly we think the judicial proceedings referred to in the constitution were supposed, by the Congress which passed the act providing for the manner of their authentication, to have related to proceedings of courts of general jurisdiction and not those which are nearly municipal authority, for it is required, that the copy of the record shall be certified by the clerk of the court and that there shall also be the certificate of the judge, chief justice or presiding magistrate, that the attestation is in due form. This is founded upon the supposition, that the court whose pro-

¹ *Commonwealth v. Green*, 17 Mass. 415.

² *State v. Chandler*, 3 Hawks, 393.

³ *Robinson v. Prescott*, 4 N. H. 450; *Mahurin v. Brickford*, 6 Id. 567.

⁴ 2 Pick. 448.

ceedings are to be thus authenticated, is so constituted as to admit of such officers; and the act has wisely left the record of magistrates who may be vested with limited judicial authority varying in its objects and extent in every state, to be governed by the laws of the state into which they may be introduced, for the purpose of being carried into effect. In Connecticut and Vermont¹ a justices judgment, rendered in "those states where Justices of the Peace hold courts of record, have been held to be within the acts of Congress, and not re-examinable where properly authenticated, and in Kentucky the judgment of an Indiana justice was held to be within the meaning of the constitution and laws of the United States.² In New York and Ohio, the same doctrine prevails as in Massachusetts, except where they are duly proved in the common law mode; then they fall within the provision of the law.³ And a decree of a court of chancery has been held within the provisions in Kentucky. So also in Louisiana, Tennessee, Maine, South Carolina and New York. Their effect being dependent upon the *lex fori*. The universal doctrine is that a judgment rendered without jurisdiction is void, whether it be a foreign judgment or one rendered in the several states, but the question arises as to the mode of determining whether the court had jurisdiction, and for this purpose the question as to whether the court was properly constituted, whether it has complied with the local law so as to acquire jurisdiction over what it has assumed to decide is admissible; and there is a distinction between the courts of *superior or general jurisdiction* and those of *limited* and inferior jurisdiction. In regard to the former the presumption is that they have acquired jurisdiction until the contrary is shown. In *Shumway v. Wilson*,⁴ Justice Sutherland stated that the rule was, that every presumption is in favor of the jurisdiction of the court. The record is *prima facie* evidence of it, and will be held

¹ Bissell v. Edwards, 5 Day; Starkweather v. Loomis, 2 Vt. 573; Blodget v. Jordan, 6 Vt. 580.

² Scott v. Cleveland, 3 Mon. 62.

³ Silver Lake Bank v. Harding, 5 Ohio, 545; Thomas v. Robinson, 3 Wend. 263.

⁴ 4 Cowen, 202,

conclusive until clearly and explicitly disproved." But in respect to courts of the latter class the rule is different; nothing is presumed in their favor, so far as it regards jurisdiction, and the party seeking to avail himself of their judgments must affirmatively show that they had jurisdiction. In *Sheldon v. Hopkins*,¹ where an action was brought on a judgment of an inferior court of a neighboring state, it was held that it could not be sustained until the statute creating and organizing the court was produced and proved, that it might be seen whether the court had jurisdiction or not;² for the courts of one state will not take judicial notice of the statutes of another. Still another question arises in regard to the determination of the effect of foreign judgments as well as those of the several states. What is the measure of jurisdiction conferred on the courts rendering the judgment by the sovereign power of the place or state in which such judgment is rendered, considered in an international point of view. Jurisdiction to be rightfully obtained must be either upon the person of the defendant, being within the territory of the sovereign, where the court sits, or else his property must be within such territory, otherwise no sovereignty can be exerted upon the principle." *Extra territorium iudicanti impune non paretur*, and should the law making power of a nation or state expressly grant to its judicial tribunals jurisdiction over persons or property not within its territory, such grant would be treated elsewhere as a mere usurpation and all judicial proceedings under it utterly void. No sovereignty can extend its own process beyond its own territorial limits to subject either persons or property to its judicial decisions.

SEC. 202. A person, however, though a citizen of another state, when he comes within the territory of a particular sovereignty, contracts a sort of temporary allegiance to it, and may justly be subjected to its process and bound personally by the judgments of its courts; and whenever the jurisdiction be founded upon the person within the territory, or their *property* being there, the judgment will be valid, so far

¹ 7 Wend. 435

² Story, Conf. Laws, § 539.

as that jurisdiction could legitimately extend, but no farther. One of the most ordinary kind of actions is that termed foreign attachment, and the process is against the property of non-resident debtors, and when that is attached and judgment rendered upon process of this kind, it binds the property ; for this is the extent of the jurisdiction of the court. But as the judgment is *in rem* against the *res*, it can have no effect as a judgment *in personam*, and is not regarded in other states or among foreign nations as evidence of any debt, nor does it receive the same credit or effect of a judgment *in personam*. The reason is that the court can only acquire jurisdiction over the property, and there can be no jurisdiction or adjudication other than that which is limited to the *Res* only. In order that a judgment may have the conclusive effect of a judgment *in personam*, the process must be personally served upon the defendant, and it must be served upon the defendant while he is within the jurisdiction of the sovereignty under which the court acts, for no sovereign has the right to issue such notice to the citizen of another state or country, and thereby draw the party from his own proper forum *ad aliam examere*. But if a party chooses to appear and contest the merits, submit to the jurisdiction of the court, waiving his personal immunity, the judgment is as conclusive as though he be a resident or citizen of the sovereignty in which the judgment is obtained, and the effect, credit and faith accorded to it in every other state, will be the same as that accorded to it in the state where it is recovered.

SEC. 203. The provisions of the constitution and statutes of the United States have been noticed in regard to the effect of the judgment of one state in the tribunals of another. By these provisions such judgments duly authenticated as the statute provides are put upon the same footing as domestic judgments. But this, observes Mr. Justice Story, "does not prevent an inquiry into the jurisdiction of the court in which the original judgment was rendered to pronounce the judgment, nor an inquiry into the right of the state to exercise authority over the parties or the subject-matter, nor any inquiry whether the judgment be founded

in and impeachable for a manifest fraud. The constitution did not mean to confer any new power upon the state, but simply to regulate the effect of their acknowledged jurisdiction over persons and things within their territory. It did not make the judgments of other states domestic judgments to all intents and purposes, but only gave a general validity faith and credit to them as evidence. No execution can issue upon such judgments without a new suit in the tribunals of other states, and they enjoy not the right of priority, or privilege, or lien, which they have in the state where they are pronounced, but that only which the *lex fori* gives to them by its own laws in the character of foreign judgments.

SEC. 204. The only point that is open to litigation in an action on a judgment of another state is the jurisdiction of the court which rendered it over the cause or the parties, and when this is once proved or admitted the judgment becomes then absolutely conclusive in regard to all other matters. In the case of *Bissell v. Briggs*,¹ Parsons, C. J., said "the manifest design of the constitution was to give greater certainty and effect to valid judgments, not to enable the courts of one state to exercise an usurped or illegal authority over the citizens of other parts of the Union, who have not been regularly served with process or in any way made amenable to the jurisdiction of the tribunal which assumes to pass sentence against them; to give a judgment the effect accorded to it by the constitution, the court rendering it must have had jurisdiction not only of the cause but of the parties. If a foreign judgment be produced by a party to obtain the execution of it here, the jurisdiction of the court rendering it is still open to enquiry, and if a defect of jurisdiction is apparent the party must fail without any enquiry as to its merits, and no faith or credit will be given to the judgment. A debtor living in one state may have goods, effects or credits in another where the creditor resides, and such creditor may there attach those goods, &c., pursuant to the laws of that state

¹ 9 Mass. 462.

in the hands of the bailiff, factor, trustee or garnishee of his debtor, and on recovering judgment those goods, effects or credits may be lawfully applied to satisfy the judgment, and the bailiff, factor, trustee or garnishee if sued in this state for those goods, effects or credits will be protected by that judgment. But if those goods, &c., were insufficient to satisfy the judgment, and the creditor should sue an action in this state where the debtor resides on that judgment he must fail, because the defendant was not personally amenable to the jurisdiction of the court rendering the judgment, and if the defendant after service of process of the foreign attachment should either in person have gone into the state or constituted an attorney so as to protect his goods, &c., from the attachment he would not thereby give the court jurisdiction of his person since the jurisdiction must result from the foreign attachment. It would be unreasonable to oblige any man living in one state, and having effects in another to make himself amenable to the courts of the last state that he might defend his property there attached.

SEC. 205. There has been considerable fluctuation in the variety of decisions and opinions rendered in regard to the question of the validity of divorces granted in other states, and there have been almost as many contradictory decisions as there are states in the Union. The courts of the various states proceeding on different grounds, and affording different degrees of facility for obtaining divorces, it has become quite common to go from one state to another, whose loose practice in regard to matters of this character is often perverted by false suggestion and apparent default, even without notice to the adverse party, and obtain a divorce, and they have generally been attacked on the ground of fraud. The U. S. Supreme Court have settled this vexed question.¹ Justice Swayne, in delivering the opinion of the court, said: "The petition laid the proper foundation for the subsequent proceedings. It warranted the exercise of

¹ Cheever v. Wilson, 9 Wallace, 108 ; Christmas v. Russell. 5 Wallace, 502; Darcy v. Ketchum, 11 Howard. 175.

the authority which was invoked. It contained all the requisite averments. The court was the proper one before which to bring the case. It had jurisdiction of the parties and the subject matter. The decree was valid and effectual according to the law and adjudication in Indiana.¹ The constitution and laws of the United States give the decree the same effect elsewhere which it had in Indiana.² It is said that the petitioner went to Indiana to procure the divorce, and that she never resided there. The only question is as to the reality of her new residence, and the change of domicile.³ That she did reside in the county where the petition is filed, is expressly found by the decree. Whether this finding is conclusive, or only *prima facie* sufficient, is a point on which the authorities are not in harmony.⁴ We do not deem it necessary to express any opinion on this point. The finding is clearly sufficient until overcome by adverse testimony. None adequate to that result is found on the record. Giving to what there is the fullest effect, it only raises a suspicion that the *animus manendi* may have been wanting. It is insisted that Cheever never resided in Indiana; that the domicile of the husband is the wife's, and that she can not have a different one from his. The converse of the latter proposition is so well settled that it would be idle to discuss it. The rule is that she may acquire a separate domicile whenever it is necessary or proper she should do so. The right springs from the necessity of its exercise, and endures so long as the necessity continues.⁵ The proceeding for a divorce may be instituted where the wife has her domicile. The place of marriage, of the offence, and the domicile of the husband are of no consequence.⁶

¹ McQuigg v. McQuigg, 13 Ind., 294; Noel v. Ewing, 9 Ind., 52; Lewis v. Lewis, 9 Ind., 105; Rourke v. Rourke, 8 Ind., 430; Tolen v. Tolen, 2 Blackford, 407; Wilcox v. Wilcox, 1 Blackford, 436.

² Darcy v. Ketchum, 11 Howard, 175; Const., art. 4, sec. 1; 1 Stat. at Large, 122; 2 Story, Const., sec. 1313; Christmas v. Russell, 5 Wall, 502.

³ Case v. Clarke, 5 Mason, 70; McDonald v. Smalley, 1 Pet. 62; Coopers' Lessee v. Galbaith, 3 W. C. C. 550.

⁴ Noyes v. Butler, 6 Barbour, 613; Hall v. Williams, 6 Pick. 239.

⁵ 2 Bishop on Marriage and Divorce, 475.

⁶ Diston v. Diston, 4. R. I. 87.

The Statute of Indiana enacted that "the court, in decreeing a divorce, shall make provisions for the guardianship, custody, and support, and education of the minor children of such marriage." Act 1852, sec. 21. That part of the decree which relates to this subject, has been already sufficiently considered. *Barber v. Barber*, 21 Howard, 582, has an important bearing upon the case under consideration. There a wife had obtained a divorce *a mensa et thoro*, and an allowance of alimony, in the State of New York. The husband afterwards removed to Wisconsin. To enforce the payment of the alimony she sued him in equity in the district court of the United States for that district. The court was clothed with equity powers. The ground of Federal jurisdiction relied upon was the domicile of the husband and wife in different States. The court decreed for the complainant. This court, on appeal, recognized the validity of the original decree, sustained the jurisdiction, and affirmed the decree of the court below. This is conclusive upon several of the most important points involved in the case before us.

It may be regarded as settled that a decree of divorce valid and effectual by the laws of the State in which it was obtained is valid and effectual in all other States.

SEC. 206. "As to how far a defendant may go into the original merits of the cause, it is indeed very difficult," said Mr. Justice Story,¹ "to perceive what could be done if a different doctrine were maintainable to the full extent of opening all the evidence and merits of the cause anew, on a suit upon the foreign judgment. Some of the witnesses may have since died, some of the vouchers may be lost or destroyed. The merits of the case, as formerly before the court, upon the whole evidence, may have been decidedly in favor of the judgment; upon a partial possession of the original evidence, that may now appear otherwise. Suppose a case, purely sounding in damages, such as an action for an assault, for slander, for conversion of property, for a malicious prosecution, or for a criminal conver-

¹ Story Conf. Laws, § 607.

sation, is the defendant to be at liberty to re-try the whole merits, and to make out, if he can, a new case, upon new evidence? Or, is the court to review the former decision, like a court of appeals, upon the old evidence? In a case of covenant, or of debt, or of a breach of contract, are all the circumstances to be re-examined anew? If they are, by what laws and rules of evidence, and principles of justice, is the validity of the original judgment to be tried? Is the court to open the judgment and to proceed *ex aequo et bono*? Or is it to administer strict law and stand to the doctrine of the local administration of justice? Is it to act upon the rules of evidence acknowledged in its own jurisprudence, or upon those of foreign jurisprudence? These and many more questions might be put to show the intrinsic difficulties of the subject. Indeed the rule, that the judgment is to be *prima facie* for the plaintiff, would be a mere delusion, if the defendant might still question it by opening all or any of the original merits on his side; for, under such circumstances, it would be equivalent to granting a new trial. It is easy to understand that the defendant may be at liberty to impeach the original justice of the judgment by showing that the court had no jurisdiction; or, that he never had notice of the suit; or, that it was procured by fraud; or, that upon its face it is founded in mistake; or, that it is irregular, and bad by the local law, *Fori rei judicatae*. To such an extent the doctrine is intelligible and practicable. Beyond this, the right to impugn the judgment is in legal effect the right to re-try the merits of the original cause at large, and to put the defendant upon proving those merits."

SEC. 207. To make a foreign judgment (the same rules apply generally to judgments of other states) conclusive, it must appear that it was a final and conclusive judgment. A judgment of a state court, the record of which shows that the defendant had no personal service and did not appear and submit to the jurisdiction of the court, is not entitled under the constitution and laws of the United States, to full faith and credit in every court within the United States. In a suit against a partnership, if one partner is not within the jurisdiction of the court, and is not served with process,

and does not voluntarily appear and answer to the suit by himself or his attorney, the judgment against the partnership cannot be enforced against him out of the local jurisdiction; even though by the *lex loci* a service on the partner resident within the jurisdiction is sufficient to authorize a judgment against all the partners.¹

SEC. 208. The estoppel is not limited to the parties, but extends, as in other cases where judicial determinations are in question to all who claim under them as privies by descent or purchase, or by construction or operation of law. Thus, a purchaser of real or personal property in one state will be bound by a judicial determination previously rendered in another against the title of the person from whom he purchases.² The law as settled in regard to judgments of other states is that the judgment of other states are only *prima facie* evidence of jurisdiction, though conclusive upon the merits of the matter in litigation, when the fact of jurisdiction is conceded, and if successfully impeached in regard to jurisdiction necessarily fail as to the merits, and they are not conclusive unless the court had jurisdiction of the cause and the parties, and a state cannot give to the proceedings of its tribunals a greater or more extensive operation than that of the laws from which they derive their whole force and virtue, which must necessarily be confined to those persons who reside within the state itself, or are in some other way justly amendable to its jurisdiction.

SEC. 209. From the authorities and cases cited in regard to the effect of judgments of other states, the following may be deduced as the law governing them :—

1st. That the plea of *nul tiel* record is the only defense admissible in an action upon them in another state.

2d. That they are *prima facie* evidence of jurisdiction, and when that is shown they are conclusive.

3d. That their operation cannot be extended beyond the limits of the jurisdiction in which they are rendered.

¹ Phelps v. Brewer, 9 Cushing, 390.

² Marsh v. Pier, 4 Rawle, 173; Fletcher v. Farrell, 9 Dana, 372; Rathbone v. Fry, 1 R. I. 73; Darcy v. Ketchum, 11 Howard, 165; Harris v. Hardeman, 14 Howard, 334.

4th. That they operate not only as a merger in the state in which they are rendered, but in every other, and precludes the right to resort to the original cause of action, either as a defense or cause of action. The debt or obligation on which they are founded, loses its distinct and independent existence, and disappears in the higher obligation created by the judicial determination of the court ; the only remedy being an action of debt on the judgment itself, and the judgment is a good plea in bar to any other action brought on the original cause of action. That if valid in the state where they are rendered they are valid in every other in which the judgment is sought to be used. The presumption is in favor of the proceedings of all duly constituted tribunals, whether foreign or domestic, and they will not be held to have exceeded or abused their powers unless the defect is clearly shown. There is no necessity for pleading in a declaration on a foreign judgment, the jurisdiction of the court over the cause or parties because this is presumed until the contrary is shown, and it has been repeatedly held that foreign judgments do not operate as a merger of the original cause of action, although conclusive on the point they decide, neither do they rise above the rank of evidence.

CHAPTER VIII.

ESTOPPEL BY DEED, OR MATTER IN WRITING.

SECTION 210. This branch of the law of estoppel, by matter in writing or by deed, is a branch of the law which does not allow or permit a sealed instrument to be controverted or contradicted by any evidence of less solemnity than its own. It is a well settled principle of law that a written contract cannot be varied by parol evidence, and this branch of the law of estoppel forbids any variation of the contract, and leaves all that lies beyond its variation to the ordinary means of proof. No mere written agreement or oral stipulation entered into between the parties to a deed, at the time of the making and execution thereof, can be given in evidence to control or qualify, or enlarge, or in any way alter or affect the express terms of the contract; nor can the operation of a deed be restricted, or the liability created by it, be lessened or discharged by an indorsement under hand only, or by any subsequent contract or agreement in writing, not under seal. But an indorsement on a deed may operate as a collateral and independent contract, and may add to the liabilities and obligations contained in the deed itself. Every deed takes effect in general from the time of its execution and not from the date inscribed in the body of the instrument. That date is to be taken *prima facie* as the true time of execution, but as soon as the contrary appears the apparent date is to be disregarded. The rule of law which stops a party from disputing or contradicting what he has affirmed or declared by deed does not extend to strangers to the contract. Where the public, or third persons for example, have an interest in the real nature of a transaction under seal between two or more parties, they are not bound by the representations and averments of those parties, but may impeach them and contradict them by parol or oral testimony. It is almost a universal system of

jurisprudence, to give a decided preference to written memorials over verbal representations, founded on the doubtful or imperfect recollection of witnesses. The French law requires a very large class of contracts to be put in writing, "in consequence," it observes, "of the corruption of manners and subornation of witnesses," and formally prohibits the admission of oral evidence against the contents of a written document. It is a fundamental rule of the common law that oral evidence shall not be given, to add to, subtract from, or alter or vary any description of written contract; "*quoties in verbis nulla est ambiguitas, nulla expositio contra verba fienda est.*" This general rule or principle of law has been established on the grounds that the writing stands higher in the scale of evidence than the oral testimony, and that the stronger evidence ought not, therefore, to be controlled or altered by the weaker.

A party who enters into a contract in writing, without any fraud or imposition practiced upon him, is conclusively presumed to understand and assent to its terms and legal effect.¹

If a man execute a deed, calling himself therein a certain name, he will not be admitted to take advantage of the fact that it is not his true name.²

Where a party makes an incorrect return of his property, liable to taxation he is estopped to deny its correctness.³

Where a statute requires a ministerial officer, like a sheriff, to make a return of his doings in making a levy, for instance, upon land, such return is conclusive evidence between the creditor and debtor in the execution, and all persons claiming under them respectively.⁴

It is a sound rule of law that a written contract cannot be altered or varied by parol proof. This excellent rule of law is intended to guard against fraud and perjuries and it cannot be too steadily enforced and supported by courts of Justice. *Expressum facit cessare tacitum—vox emissa volat—*

¹ Rice v. Dwight Co., 2 Cush. 80.

² Com. Dig. B. 1.

³ Telle v. Green, 28 Ind. 184.

⁴ Bott v. Burnell, 11 Mass. 163; Whittaker v. Sumner, 7 Pick. 551; Butts v. Francis, 4 Conn. 424.

littera scripta manet are law axioms in support of this rule, and law axioms are nothing more than the conclusions of common sense, which have been formed and approved by wisdom of ages. This rule prevails equally in a court of equity and a court of law. Generally speaking the rules of evidence are the same in both courts, and if words of a contract be intelligible there is no instance where parol proof has been permitted to give them a different sense. You can introduce nothing on parol proof that adds to or deducts from the writing. If, however, through fraud or mistake, it is made to speak a different language from what was intended the estoppel does not apply. These are the only cases that form an exception to the rule.

SEC. 211. In what manner a deed or contract is to operate must be ascertained from its own language; on what it is to operate may be gathered from the whole field of parol evidence, whether the parties were under a disability *sui juris*, by what right or authority they conveyed, what the location is, or the quantity of the land conveyed, and what the title of the grantor is, may ordinarily be sought outside the deed, and, as is frequently the case, can be ascertained in no other way. Notwithstanding these matters, the parties to a deed or contract may agree to bind themselves, in this respect by setting a particular state of things as a part or basis of the grant or contract. And when this is done with sufficient clearness as to leave no doubt as to the intention it falls within the general principle that matters which have been solemnly reduced to writing cannot be denied, and constitutes an estoppel by deed. So far as a deed is intended to pass, or extinguish a right, it is the exclusive evidence of the contract, and the party is concluded by its terms, but the deed is not conclusive evidence of the existence of facts acknowledged in the instrument, such as its date, acknowledgment of payment, consideration, etc. There are few rules of law that are better established or of greater antiquity than the one which has firmly settled the question, that a man may irrevocably bind himself by putting his seal to a grant or covenant, and that he will not be allowed to disprove or contradict any declaration or averment con-

tained in the instrument and essential to its purpose. A recital or allegation in a deed or bond, which is certain in its terms and relevant to the matter in hand, is conclusive between the parties to the controversy growing out of the instrument itself or the transaction in which it was executed. That no man shall be allowed to dispute his own deed for it is not only conclusive upon the party executing it as to the very point intended to be effected by the instrument, but also as to the facts recited in it, is a well settled principle of law.

SEC. 212. This principle of estoppel is founded on the general doctrine that a man shall not defeat his own act or deny its validity to the prejudice of another. If a man execute a deed, calling himself a certain name, he is estopped from taking advantage of it. Thus, if a man by the name of Henry Jones prepare and sign a deed as George Jones, he is estopped from denying that his name is George Jones in order to avoid the deed. So where a man in his deed recites particular facts, these facts become conclusive evidence against him, and he is not at liberty to deny the truth of his statement. One who makes a feoffment cannot allege that his feoffee has not seized or set up any title acquired subsequent to the feoffment.¹ Estoppel by deed, extends to persons claiming under the person estopped in the same manner as an estoppel by record does. No person can avoid his own deed by which an estate has passed on the ground of *his own hand* in executing it.

SEC. 213. Esoppels by deed, as far as they are applicable, or may be applied to deeds conveying real estate, create what in law is termed a title by estoppel, which, in the language of another is defined as follows: A title by estoppel is where equity, and in some cases the law, in order to accomplish the purposes of justice which cannot otherwise be reached, draws certain conclusions from the acts of one party in favor of another, in respect to the ownership of lands which it does not allow the first to controvert or deny. Estoppels differ from evidence in this that the former are received as

¹ 2 Prest. abst. 407; *Sinclair v. Jackson*, 8 Cow. 586; *Douglas v. Scott*, 5 Ohio, 199.

conclusive, and preclude all inquiry as to the merits of the title, while evidence is merely the medium of establishing facts which do exist or have existed. As an estoppel against an estoppel sets the matter at large, a warranty opposed to a warranty leaves the matter as though none had been made.¹ Estoppels do not give an estate nor do they divest another of an estate or interest in lands. They merely bind the interest by a conclusion which precludes the parties between whom it is made to operate from asserting or denying the state of the title,² or in other words, a title is presumed rather than acquired by estoppel, inasmuch as a person is concluded by his own act from disputing the title of another.³ As has been heretofore observed that estoppels must be reciprocal or mutual, they are inapplicable to infants or *femes covert*, except as will be hereafter shown, for to be binding upon one they must bind the other also. In treating of estoppel by deed, it must be understood that unless the deed was aided by the estoppel it would be of no avail, by reason of the state of facts being different from what they are assumed to be by the instrument itself, and which facts if true would have given the same effect to the deed by its own intrinsic virtue which it receives by the aid of the estoppel; as, for instance, if for a valuable consideration, A. makes a deed to B. wherein he assumes to convey a specific parcel of land, he thereby asserts that he is the owner of it, and that a title of the same thereby passes to B. and yet if he has no title, nothing in fact passes by the deed. But if he shall, soon after this, become the owner of this land, and the purchaser insists upon claiming it, it would not be open to him to deny such claim, after having thus taken the grantees money, and having solemnly declared that he was and should be the owner of the land.⁴ Estoppels by deed, are applied in some action or proceeding based on the deed, in which the fact in question is recited. In a collateral action

¹ Washburn on Real Property.

² 1 Prest. Abst., 420; 2 Id. 205.

³ Crabb. Real Prop., 1046.

⁴ Clark v. Baker, 14 Cal. 629.

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be no estoppel,¹ nor will estoppels by deed avail any but the parties and their privies.²

SEC. 214. An estoppel by deed is a mode of preserving rather than of acquiring property, inasmuch as a person is concluded by his own act from disputing the title of another. The estoppel of a deed will be limited to actions based upon it or growing out of the transaction in which it was executed, and does not extend to a collateral action where the cause is different, while the subject matter may be the same.³ The law of estoppel is no exception to the general principle, that the operation of deeds is a question of intention and will not be carried further than the parties appear from the tenor of the whole instrument to have agreed. "When it can be collected from the deed that the parties to it have agreed upon a certain admitted state of facts, as the basis on which they contract, the statement of those facts, though only by way of recital, estops the parties from proving the contrary. Therefore, the introduction of a statement into a sealed instrument will not render it conclusive unless there is sufficient reasons for believing that such was the design or that some injustice would result from allowing it to be contradicted.⁴ The presumption is against rather than in favor of the estoppel, and those relying upon it must show that it results from the language of a particular clause, and is in accordance with the object and tenor of the deed; a vague, general or ambiguous statement not indicating that the parties meant to tie themselves down to a particular state of facts, consequently will not operate as an estoppel, nor will an estoppel be raised by intendment or implication from language susceptible of another interpretation.⁵

¹ *Carter v. Carter*, 3 Kay & J. 645.

² *Carpenter v. Bullen*, 8 M. & W. 212.

³ *Collins v. Tillyou*, 26 Conn. 368; *Carpenter v. Bullen*, 8 M. & W. 219; *Merrifield v. Panott*, 11 Cush. 590.

⁴ *Young v. Raincock*, 7 C. B. 310; *Hay v. Askew*, 5 Jones, 63; *S. E. R. W. Co. v. Warton*, 6 Hurl. & N. 520; *Osborn v. Endicott*, 6 Cal. 139.

⁵ *Brinegar v. Chaffin*, 3 Dev. 108; *Campbell v. Knight*, 24 Maine, 332; *McComb v. Gilkey*, 29 Miss. 146; *Dechert v. Blanton*, 3. Sneed, 373; *Dempsey v. Tylee*, 3 Duer. 73; *Pelletreau v. Jackson*, 11 Wend. 110; *Right v. Bucknell*, 3 B. & Ad. 278; *Hays v. Askew*, 5 Jones, 63.

SEC. 215. In order to give rise to an estoppel by deed, the parties must ordinarily be *sui juris*, and the instrument so executed as to be binding in law.¹ The deed of a married woman will not operate as an estoppel where it fails as a grant, or estop her from setting up an estate obtained subsequently or by purchase, against the grantee.² This, like the grant, is limited to the estate the wife has at the time, and does not extend to an interest acquired after the execution of the deed, for she can not bind herself subsequently by any covenant. Where the deed of a married woman fails as a conveyance from the non-concurrence of her husband, it is ineffectual for all purposes, and can not be relied upon as an estoppel or ground of recovery in a subsequent controversy.³ In some instances it has been held that a warranty in a deed of a married woman will have the same effect in binding and transferring future estates as if she were sole,⁴ but this has been denied in others. But by statute in New York, she may bind herself by covenants in a deed made jointly with her husband. But not as to any title subsequently acquired.⁵ While a wife is competent to join with her husband in executing a conveyance of her land, her covenants of warranty and of title are not binding on her. Her conveyance operates as an estoppel as to the title thereby granted.⁶ The recitals contained in a deed of a married woman are limited to the estate which she has at the time, and does not estop her from showing that they are false, because while she has the capacity to convey, she has not to contract.⁷ A married woman can not bind herself by covenant during coverture, nor is she estopped by her covenant from setting up an after acquired

1 Sinclair v. Jackson, 8 Cow., 543; Wallace v. Miner, 6 Ohio, 366.

2 Wadleigh v. Glines, 6 N. H., 18.

3 Lowell v. Daniels, 2 Gray, 188.

4 Hill's Lessee v. West, 8 Ohio, 226; Nash v. Spofford, 10 Met., 192; Welborn v. Finley, 7 Jones, 228; Doane v. Willett, 5 Gray, 328.

5 Jackson v. Vanderheyden, 7 Johns. 167; Wight v. Shaw, 5 Cush. 56; Den v. Demarest, 1 N. J. 541; Grout v. Townsend, 2 Hill, 557; Pentz v. Simonson, 13 N. J., 239; Colford v. Swan, 7 Mass. 291.

6 Schafner v. Grudmaker, 6 Iowa, 137.

7 Griffin v. Sheffield 38 Miss. 359; Dempsey v. Tylee, 3 Duer, 73.

interest in lands conveyed jointly with her husband.¹ To hold her estopped from asserting her title, would be equivalent to holding her bound by the covenant.² Nor is a married woman estopped by her representations that she is a *feme sole*.³ But it has been held that estoppels by warranty apply to cases of conveyances of their lands by married women joining with their husbands. For, though in such cases the wife is not personally liable upon her covenant, she and those claiming under her are estopped, in the same manner as if she were a *feme sole*, against setting up an after acquired title to the land conveyed.⁴ In the case of *Jackson v. Vanderheyden*, the court say, that though a deed with covenants of warranty by husband and wife of the wife's land would convey her real estate, or any existing or contingent future interest in it, "such deed cannot operate as an estoppel to her subsequently acquired interest in the same land." It is well settled that a married woman would not, at common law, be personally liable upon covenants contained in the deed of herself and husband. It has been held that a married woman's lands held under the statute to her sole and separate use, were bound by her covenants, as if she were at the time sole and unmarried.⁵ In Oregon the courts hold that estoppel in deeds without warranty apply to married women.⁶

In New York the court held that as a conveyance by a married woman, and her husband reciting that the land was hers did not estop her, and could not be binding upon the other parties, and left both her husband and grantee free to allege that the land in point of fact belonged to her husband.⁷ So a widow may show that land assumed to be conveyed by her husband by a deed in his lifetime did

¹ *Jackson v. Vanderheyden*, 17 John, 167; *Griffin v. Sheffield*, 38 Miss., 359; *Wadleigh v. Glines*, 6 N. H., 17.

² *Canan v. Farmer*, 3 Ex. Rep., 698.

³ *Conner v. Martin*, 1 Stra. 516; *Legg v. Legg*, 5 Mass. 99.

⁴ *Hill v. West*, 8 Ohio, 222; *Colcord v. Swan*, 7 Mass. 291; *Nash v. Spofford*, 10 Met. 192.

⁵ *Bassford v. Pearson*, 7 Allen, 505.

⁶ *Graham v. Meek*, 1 Oregon, 325.

⁷ *Dempsey v. Tyler*, 3 Duer 73.

not belong to him; the same ground may be taken by the grantee in a suit brought by her for dower.¹ And in Missouri it has been held that the recitals in a deed by which a married woman purports to convey her title to land do not estop her, nor those claiming under her from asserting the truth against the recitals.² In Pennsylvania the contract of a married woman being void it cannot be ratified unless by deed in the statutory mode. Positive acts of encouragement which might operate to estop one *sui juris* will not affect one under legal disability. A married woman by agreement signed only by herself and without an acknowledgment contracted to sell land, she received one year's interest and part of the purchase money. The purchaser took possession and made improvements with her knowledge and encouragement. The court held that neither the principle of estoppel nor compensation would prevent her from recovering the land.³ In regard to infants it is the universal rule that estoppels do not apply to or effect them, with but this one exception. The fraudulent acts, concealments or representations of an infant when made or done with a view to deceive or defraud others will be as binding upon them as upon an adult and their contracts will be enforced against them.⁴ Where the defendant in an action for breach of covenants in a warranty deed to a married woman admits the execution of the deed but does not allege fraud, accident or mistake he is estopped from claiming that the covenants do not run to the grantee or that her husband is the real party in interest,⁵ nor is a *feme covert* estopped by joining in a deed of her husband's land containing covenants of warranty from setting up a title subsequently acquired with her own means independent of her husband.⁶ A warranty deed by

¹ Grant v. Wainman, 3 Bing. N. C. 69; Gardner v. Greene, 5 R. I. 104.

² Hempstead v. Easson, 39 Mo. 142.

³ Glidden v. Struppler, 52 Penn. 400.

⁴ Kilgore v. Jordan, 17 Tex. 341; Overton v. Bannister, 3 Hare 503; Adams' Equity 176; Watts v. Creswell, 9 Viner 415; Conyert v. Gertchen, 2 Maddox 40.

⁵ Gray v. Stockton, 8 Mumf. 529.

⁶ Childs v. McChesney, 20 Iowa 431; Nunally v. White, 3 Met. Ky. 293; Baxter v. Bodkin, 25 Ind. 172.

the husband does not estop the wife from enforcing a prior mortgage held by her as her separate property against the husband's grantee and those holding under him.¹ In Illinois the courts hold that a married woman may be estopped to claim homestead where she and her husband join in a deed of the premises and then abandon them.² When a conveyance by a husband and wife of the wife's land is void for the want of proper acknowledgment as to her, the children will not be estopped by the warranty of the husband.³ A grantor is estopped by his deed to say that he had no interest in the land.⁴ To have this effect the one who is estopped must have joined in the deed as a grantor therein and must have been capable of making a valid deed. Thus where a husband made a deed with covenants of warranty of his wife's estate in which she joined by a clause relinquishing her right of dower but not by words of grant, it was held that neither she nor her heirs were estopped thereby to claim the land even at the end of twenty-nine years after making the deed.⁵ And where a deed was made to a *feme covert* who at the same time made a mortgage to secure a part of the purchase money it was held to be a void deed of mortgage since a *feme covert* could not make a deed.⁶ In this respect the estoppel is not reciprocal, for a grantee who holds an executed title under a deed may deny his grantor's title in the same manner as he could that of a stranger.⁷

SEC. 216. Estoppels must be mutual ; they are limited to parties and privies, and cannot be enforced by or against strangers. When, however, the estoppel takes effect upon and passes an after acquired title, third persons are as much estopped from questioning its operation as the parties, while

¹ Bartlett v. Boyd, 34 Vt. 256.

² Brown v. Coon, 36 Ill. 243.

³ Chauvin v. Wagner, 18 Mo. 581; 3 Small v. Proctor, 15 Mass. 499; Calender v. Woodruff, 11 Ark. 82; Sparrow v. Kingman, 1 N. Y. 242; Moore v. Gonow, 3 A. K. Marsh, 41.

⁴ Fairtitle v. Gilbert, 2 T. R. 181; 2 Crabb Real prop. 1048.

⁵ Raymond v. Holden, 2 Cush. 264.

⁶ Concord Bank v. Bellew, 10 Cush. 264.

⁷ Winlock v. Hardy, 4 Lit. 272.

they may still be at liberty to show that the title is not valid or did not come within the reach of the estoppel. A purchaser at a judicial sale is, in general, bound by and entitled to take advantage of every estoppel that could have been enforced by or against the party whose property is sold, and this is equally applicable to the creditor under whose judgment or execution the sale is made.¹ Estoppels operate neither in favor of nor against strangers, but affect only parties and privies. Privies in blood, in estate and in law. Privies, or those who derive title from or through the parties ordinarily stand in the same position as the parties, and are bound by every estoppel that would have been binding on the parties. A stranger can neither take advantage of nor be bound by an estoppel.² Still it is sometimes difficult to make the distinction between privies and strangers. Thus, where one who had been disseised, conveyed the land by deed to a stranger, and then sued his disseisor for possession, it was held, that his deed to a stranger did not estop him from maintaining the action.³ So where the deed to the stranger passed nothing for the want of proper execution, the tenant, not a party to it, cannot avail himself of it.⁴ But a person in possession, sustaining his possession by no other title than a denial that a former owner had parted with his right, is not a stranger. He becomes privy in estate to him whose title he maintains, and is estopped by what destroys that in his hands. For if title can be traced by B. to A., and B. can fasten upon A. the incapacity of asserting his right in consequence of his admission that he has conveyed to B., it is not just that one standing on A.'s claim only and relying on no superior right, should be permitted to contest the existence of a fact which those interested have settled. Any person claiming under one who is bound by an estoppel, is himself bound by the same

¹ Waters Appeal, 35 Penn. 525; Richards v. Johnson, 4 Hurls. & N. 660.

² Doe v. Errington, 6 Bing. N. C. 79; Jackson v. Bull, 1 Johns. 90; Jackson v. Brinckerhoff, 3 Johns. 103; Miller v. Holman, 1 Grant Cas. 243; Jackson v. Bradford, 4 Wend. 623; Kimball v. Blaisdell, 5 N. H. 535; Sunderlin v. Struthers, 47 Penn. St. 423.

³ Wolcott v. Knight, 6 Mass. 418; Jackson v. Brinckerhoff, 3 Johns. 103.

⁴ Patterson v. Pease, 5 Ohio, 190.

estoppel.¹ Thus, a purchaser from one who had made a prior deed with warranty, was estopped by the first deed as well as his grantor, although it had never been recorded, provided he had notice of its existence when he took his deed. Where A., by a deed of mortgage with warranty, conveyed his estate, upon which there was an outstanding mortgage, and A. purchased this and took an assignment of it to himself in his own right, it was held, that this latter mortgage enured to the benefit of A.'s mortgagee with covenants.² But if, after having made a conveyance with warranty without having title, the estate comes to him as a mere conduit in passing it from its owner through him to another person, it does not enure to the benefit of his original grantee.³ There is a distinction between an estoppel in evidence and in point of estate. Thus a deed poll cannot create an estoppel in point of estate. But if such deed recites that A. by bond did a particular act, the maker of the deed cannot deny that there was no such bond.⁴ A deed or bond procured by fraud will not operate as an estoppel upon the party defrauded ; relief may be granted under the circumstances, at law, not only when the fraud enters into it and vitiates the execution of the instrument, but when it consists in a misrepresentation of the nature and value of the consideration.⁵ But one of the parties to a sealed instrument cannot resist a recovery upon it by alleging that it was concocted by both in fraud of a third person.⁶

SEC. 217. Where the truth appears upon the face of an instrument, there can be no estoppel.⁷ In *Pargetter v. Harris*,⁷ the court said : "The lessor was not estopped from

¹ *Phelps v. Blount*, 2 Dev. 177; *Douglass v. Scott*, 5 Ohio, 199; *Mark v. Willard*, 13 N. H. 389; *Maple v. Russart*, 53 Penn. St. 351.

² *Kelly v. Jenness*, 50 Me. 455.

³ *Kelly v. Jenness*, Sup.; *Runlet v. Otis*, 2 N. H. 167; *Marsh v. Rice*, 1 N. H. 167.

⁴ *Shep. Touch*, 53.

⁵ *Hazard v. Irwin*, 13 Pick. 95; *Phillips v. Potter*, 7 R. I. 289; *Hart v. Holcomb*, 3 Foster, 535; *Chew v. Moffatt*, 6 Munf. 120; *Tomlinson v. Mason*, 6 Rand. 169; *Greathouse v. Dunlap*, 3 McL. 303; *Leanard v. Bates*, 1 Blfd. 172.

⁶ *Maybee v. Snippen*, 16 N. Y. 560.

⁷ *Pargetter v. Harris*, 7 Q. B. 708; *Wheelock v. Henshaw*, 19 Pick. 341; *Coke Litt.*, 352.

denying that no estate had passed, by an assignment of the reversion on which a recovery could be had by the assignee, because the lease disclosed that a mortgage had been given of the premises under which the legal title had vested in the mortgagee." Where there is an admission that the grantor has no title at the time of the grant, he is liberated from any estoppel that may arise; if there is a warranty in the deed, and he is enabled to rely on an outstanding title in a third person as an answer to an action brought by the grantee.¹ There are, of course, exceptions to this rule, as there is to every rule of law, no matter how well settled or how long it has been established. It must appear to every one that when that which is expressly or impliedly alleged in one part of an instrument, is elsewhere as unqualifiedly denied, both statements must be disregarded and the parties permitted to show how the matter really is or stands.² This state of facts or circumstances creates what is termed or known as an estoppel against an estoppel, and sets the matter at large.³ Thus a warranty opposed to a warranty sets the matter at large and there is no estoppel. But when from the terms of a contract or the circumstances under which it is made, it appears unequivocally that an allegation or recital was meant to control or qualify the other and take effect as if the other had not been inserted, no such case arises. While the acceptance of a deed, or the benefit which it confers, may make it more or less persuasive evidence against a grantee, by whom it was not sealed; it cannot be made his deed, or estop him from showing that nothing passed by its operation from the grantor, and when the deed is sealed by the grantor alone, the grantee may question his title.⁴ A deed poll estops the grantor, but not the grantee, and the question as to whether both are to be estopped by a deed, or only one, must be ascertained from the whole deed. There is no principle of law which prevents a man from binding himself while leaving others free. A conveyance by bargain and sale,

¹ *Wheelock v. Henshaw*, 19 Pick. 341.

² *Sinclair v. Jackson*, 8 Cowen, 543.

³ *Carpenter v. Thompson*, 3 N. H. 204; *Coke Litt.* 352, b. 1; *Com. Dig. Est.*

⁴ *Sparrow v. Kingman*, 1 N. Y. 242; *Blanchard v. Ellis*, 1 Gray, 155.

or lease and release, without warranty or covenants for title, do not ordinarily estop the grantor, but this arises from the generality of the words employed, and is equally applicable and true, whether the grant be by deed poll or by an indenture, executed by the grantee. Therefore, when both parties put their seals to the deed, it may still be a question whether the words of a covenant or recital, by which one of them is alleged to be estopped, are his, or should be regarded as proceeding solely from the other.¹ A deed executed by one party only, but containing an express covenant on the part of the other to perform certain acts, binds the latter, if he accepts the deed and takes possession under it, as effectually as if he had signed it, although it may be otherwise with a naked condition unaccompanied by any covenant on the part of the grantee.² A covenant entered into between owners of adjoining city lots, for themselves and all claiming under them, to the effect that all buildings erected on such lots shall be set back a specified distance from the line of the street on which the lots front, is a covenant which equity will enforce between the parties to it, in favor of one against the other, or in favor of and against any subsequent grantee of either lot.³

SEC. 218. Where husband and wife joins in a deed of the premises, though not in such a form as to be in itself a release of the homestead, and then removes from the premises and the purchaser enters upon the same and sells them, it works an estoppel upon the wife as to the claiming of a homestead right therein.⁴ But one taking a deed from a debtor, in which is a recital that the premises are those on which the grantor resides, is estopped to set up that the grantor has abandoned the premises at his residence.⁵ But so far as a husband has an interest, independent of his wife and children, in a homestead estate, he is at liberty to convey it subject to their rights, and may enter into covenants in re-

¹ Stronghill v. Buck, 14 Q. B. 781.

² Spaulding v. Hallenbeck, 35 N. Y. 204.

³ Roberts v. Levy, 3 Abb. Pr. N. S. 311.

⁴ Brown v. Coon, 36 Ill. 243.

⁵ Williams v. Swetland, 10 Iowa, 51 ; Christy v. Dyer, 14 Iowa, 438.

spect to the same which will bind and estop him, as in the conveyance of any other estate. But if he convey with covenants of warranty, he is estopped to claim it against his grantee or his assigns, nor is it any bar to an action by such grantee to recover possession of such estate, that the grantor's children are entitled to a homestead therein, unless the same has been set out and assigned as such. If such grantor attempts to have a homestead set out against a grantee, he is estopped in equity from so doing. Nor can his wife and minor children do this during the husband's life, in proceedings against a purchaser with covenants. They are as much estopped thereby as the husband.¹

SEC. 219. The government of the United States is not ordinarily bound by an estoppel,² but it is applicable in some instances to a state; thus where a state by an act of its legislature granted to a town forever the use of certain lands, for the benefit of the town. The state having parted with all the interest it had in the lands, was estopped from claiming a forfeiture accruing before the grant was made.³

SEC. 220. Where parties claim title from one person as a common source neither can deny that the person had such title.⁴ In a contest for town lots both parties claiming under the trustees, the defendant is estopped to deny the right of the trustees or to set up an outstanding title;⁵ where parties enter into possession under a compromise and occupy and enjoy according to the terms of it for eleven years, they cannot afterwards repudiate it,⁶ where a person received the legal title of land for the use of certain creditors of the owner thereof, he cannot set up any title which would affect the trust,⁷ an estoppel will generally be suppressed where its enforcement would produce fraud, and will on the other hand be called into being for the prevention of fraud. A vendor who sells real estate to an executor, receives the money and

¹ Foss v. Strachn, 42 N. H. 42.

² Johnson v. United States, 5 Mason, 425.

³ Vt. v. Society &c., 2 Paine, 545.

⁴ Grimes v. New Orleans, 6 Wall.

⁵ McClain v. Gregg, 2 A. K. Marsh, 454.

⁶ Washburn v. Washburn, 4 Fred. (eq.), 306.

⁷ Pane v. Oliphant, 14 Penn. 342.

executes a deed therefore in accordance with the terms of the contract of sale, is thereby estopped from claiming in an action brought against him by the executor for rent received after the sale; that the purchase is invalid because made to the executor, without being authorized by a probate court.¹ It is well settled in England that the rule estopping a party by his deed, does not apply so as to preclude a party from asserting that the transaction was contrary to law or void, on the ground of fraud, and for this purpose giving evidence to contradict the statements contained in the deed.

SEC. 221. The owners of a tract of land purchased at a land sale is estopped to deny the right of one who has bought at a sale under an execution against him, though such purchaser at the land sale has not yet paid for the land and therefore has acquired no legal title.² If one makes an obligation under duress and after being at large takes a defeasance upon it, this makes the obligation good again and estops the obligor from saying that it was by duress.³

SEC. 222. The declarations of parties to a public act cannot be contradicted by parol testimony introduced by the party who has made those declarations, unless on the allegation and proof of fraud, duress or error.⁴ So where a defendant conveyed premises in controversy, by warranty deed to "C." and plaintiff claimed under an execution sale thereof to "C." The defendant was estopped by his deed from asserting any title against all claiming under "C."⁵ Where the averments in a petition amount to an acceptance of a succession, the plaintiff is estopped from contesting a valid title derived from the person whom he succeeds, he is the warrantor of the title.⁶ One who gives a deed of lands which are in adverse possession of another, is estopped from disputing the deed, and the grantee may enforce his rights under it against the person in possession in the

¹ *McNamee v. Moreland*, 26 Iowa, 96,

² *Hunsucker v. Tipton*, 13 Ired. 481.

³ *Shep. Touchstone*, § 62.

⁴ *McRae v. Ereditas*, 16 La. 305.

⁵ *Dodge v. Vatty*, 22 Cal. 224.

⁶ *McQueen v. Sanders*, 15 La. 141.

name of the grantor.¹ The sale by one part owner, while it is inoperative against the other joint owners, and cannot affect their interest in the property, will operate against him, by way of estoppel.²

SEC. 223. There is an implied warranty between coparcener's as to the property allotted in partition which will work an estoppel,³ where partition is made and the parties take possession according to the survey and map made at the time. They are estopped from controverting a boundary, on the ground of an alleged mistake, which they claimed to have discovered in a later survey.⁴ So where the owner of a life estate, and the owner of a fee made partition of land and executed to each other releases in fee, after the division, a sale and conveyance by either party, of the portion allotted them in the partition, is a confirmation of the partition, and estops the parties from claiming any interest in the part allotted to the other.⁵ A party is not estopped by his admission or assertion of a conclusion of law upon undisputed facts. Thus, where there had been a partition of real estate among devisees by action, and occupying under it, claiming as owners in fee, it was held that no estoppel was created, as against one of the devisees in favor of his judgment creditor, who purchased the share of such devisee, at a sale under his own execution, so as to prevent such devisee from showing, in order to defeat such purchasers' action of ejectment, that by the devise, the legal estate was vested in the executors and not in the devisees, at the time of the docketing of such judgment, and, therefore, that such judgment was not a lien on the share of such devisee, and the purchaser acquired no right or title by his purchase at said sale.⁶

SEC. 224. In Massachusetts the certificate of acknowledgment and the registration of a deed do not estop a third person from proving that both the deed and the certificate were

¹ *Stockton v. Williams*, 1 Doug. 566.

² *Trannell v. McDade*, 29 Tex. 364.

³ *Farran v. Christy*, 33 Miss. 44.

⁴ *Jackson v. Hasbrouck*, 3 Johns. 331.

⁵ *Baker v. Lorillard*, 4 N. Y. 237.

⁶ *Brewster v. Striker*, 2 N. Y. 19.

fraudulently antedated.¹ In Indiana the notarial certificate is conclusive.² Fraud will vitiate anything, even the most solemn transactions; any asserted title founded on it, is utterly void.³ Fraud is an extrinsic, collateral act, which vitiates the most solemn proceedings of courts of justice and avoids all judicial acts. A voluntary conveyance or any conveyance in fraud of the law is not a nullity, but binds parties and privies.⁴ An invalid contract is no estoppel. Thus, where a paper signed by a judgment debtor and delivered to the attorney of his creditors agreeing to compromise the judgment in a certain way, or in default thereof to deliver certain property levied upon in payment, cannot estop him from claiming that the levy was invalid, where it appears that the attorney had no authority to enter into such agreement, or to compromise the judgment in any manner.⁵ Every creditor who signs a composition deed is estopped from setting up any private agreement repugnant to its terms, or inconsistent with its intention or spirit.⁶ So where A. executed an agreement signed in his own name which referred to a schedule annexed, which schedule was signed by A. and B., A. is estopped from denying that he signed it.⁷

SEC. 225. Gifts and voluntary conveyances made by the husband to the wife, without fraudulent intent at a time when he is not indebted, cannot be called in question by subsequent creditors; so where a grantor conveys premises to a woman, on receiving the price from her husband he is estopped by his conveyance from complaining that the conveyance was in fraud of himself as a creditor of the husband, for he not only consented but performed the act himself.⁸ A purchaser of land who has knowledge of facts which estop his grantor from asserting title to the granted premises, stands

¹ *Holbrook v. Worcester Bank*, 2 Curtis, C. C. 244.

² *McNeeley v. Rucker*, 6 Blfd. 391.

³ *United States v. Armstead*, 15 Peters, 518.

⁴ *Randall v. Phillips*, 3 Mason, C. C. R. 378.

⁵ *Hinkley v. Hillsdale*, 12 Mich. 99.

⁶ *Breck v. Cole*, 4 Sand. 79; *Khight v. Hunt*, 5 Bing. 432; *Sadler v. Jackson*, 15 Ves. 32; *Leceister v. Rose*, 4 East, 372; *Middleton v. Lord Onslow*, 1 P. Wms. 768.

⁷ *Smith v. Burnham*, 9 John. 306.

⁸ *Phillips v. Wooster*, 36 N. Y. 412; *Baker v. Lorillard*, 4 N. Y. 257.

in the same condition as his grantor.¹ Thus where a party conveyed an estate by entireties to a man and wife, the grantee being the debtor of the grantor, the grantor brought an action for the debt, obtained judgment and sold the land he had conveyed, both he and the purchaser were estopped from alleging that the conveyance was made to the wife in fraud of her husband's creditors. If the grantee in a deed is estopped, his administrator with the will annexed is also estopped.² A widow continuing in possession of land, is estopped to deny the title derived under her husband's deed.³ Where one conveys certain real estate to the husband, and makes a deed to the wife of a portion of the same land conveyed in the deed to the husband, reciting that the consideration proceeds from the wife's estate, the grantor being estopped to deny that his second deed conveyed any estate, his administrator is bound by the same estoppel. A deed which is an act of maintenance, by reason of an adverse possession, is yet effectual between the parties, for it estops the grantor and is a bar to his recovery in ejectment.⁴ In a title to land by estoppel, ejectment may be maintained.⁵

SEC. 226. Where land is purchased for a specific purpose by several grantees, with condition that it shall not be divided, the grantees and those claiming under them are estopped from claiming partition or division. Thus where land purchased for the site of a hotel to be erected by an association, and was conveyed to the individual members in individual shares, upon conditions that each member, his heirs and assigns, shall hold the same in common with the tenants of the other parts without partition or division, the grantees and those claiming under them are, as against the others, estopped to demand partition, as all claim under deeds from the same grantors, and the deeds were made in

¹ *Stinchfield v. Emerson*, 52 Me. 465 ; *Phillips v. Wooster*, 36 N. Y. 412.

² *Dennison v. Ely*, 1 Barb. 610.

³ *Grandy v. Bailey*, 13 Ired. 221.

⁴ Bro. Tit. feoffments, Pl. 19, 27 Hen. 8th fol. 23, b, 24 a Co. Lit. 369r, Cro Eliz. 445 ; Hank. b 1, c 86 ; *Jackson v. Demorest*, 9 John. 55 ; *Jackson v. Wheeler*, 10 Johns. 164.

⁵ *Stoddart v. Chandler*, 2 Howard, 281.

pursuance and furtherance of a common object, and as part of the same general transaction.¹

SEC. 227. Where the owner of land, for the purpose of evading the payment of the debt of an anticipated creditor, conveys the same to another, to be held as a secret trust for the grantor, equity would not enforce the trust, yet should the grantor die while the title was thus situated, and the grantee and trustee voluntarily convey the land back to the executors of the grantor, who accept the conveyance in their capacity as executors, and for the avowed purpose of placing the property to the benefit of the estate where it belonged, the executors are estopped to deny that the testator died seized of an equitable estate of inheritance in the premises, as against his heirs, devisees or widow; nor can any of the beneficiaries deny the seizin of the testator, for the purpose of disputing the rights of others, they themselves claiming by virtue of such seizin.² One who covenants to give title to lands which he expects to purchase and does purchase at a government sale, can not afterwards plead his own fraud in obtaining his title from the government, in bar of a decree for specific performance of his agreement.³ Where both parties to a suit claim under the same grantor, each is bound to admit that the grantor's title was good, unless he can show that he has acquired a better one; and neither will be allowed to set up his own possession or an outstanding title in a third person as an answer to the right of the other as shown on the face of the deed.⁴

SEC. 228. This seems to be all that is meant by the broad declaration in such cases, that a man who accepts or acts under a deed cannot dispute or controvert the facts which it recites.⁵ In cases like the one just cited, the estoppel

¹ Hunt v. Wright, 47 N. H., 396.

² Brown et al., v. Pitney, 39 Ill., 470.

³ Faekler v. Ford, 24 Howard, 322.

⁴ Addison v. Crow, 5 Dana, 271; Carver v. Astor, 4 Pet. 11; Love v. Gates, 4 Dev. & B., 363.

⁵ Funk v. Newcomer, 11 Ind. 301; Springstein v. Schermerhorn, 12 Johns. 363; Chantauqua Bank v. Risley, 4 Denio, 480.

is equitable rather than legal, and arises where the deed does not specifically recite the grantor's title, and is so generally worded that no technical estoppel could arise from its language consistent with right. It would be too much to say that if a man who is in possession under a good or even colorable title, buys in a defective title in the hope of strengthening his position, he will thereby defeat his own object, and be estopped from relying on his better right as an answer to a prior deed or mortgage of the vendor.¹ When the land and title are transferred at the same time and constitute the sole reliance of the grantee, his right can rise no higher than that of the grantor, and is subject to every claim that would have been good against the grantor had the transfer not been made. This applies in cases where there are prior deeds or mortgages. With this limitation the rule is a beneficial one. Were it otherwise the grantor might keep the grantee out of possession of the very land which he assumed to convey, or the grantee defeat prior estates or incumbrances created by the grantor.² There can be no application of this rule when either party, instead of merely denying the title of the other, claims under a paramount right acquired after the conveyance was made.³ Whoever prevents the performance of a condition cannot take advantage of it.⁴

A claim or title to land which can not be set up by a person while in possession, cannot be set up by another person who comes into possession under him.⁵ Where a license is not produced, the executor being sole legatee in the will, and he conveys premises by deed with personal covenants, if warranty against incumbrances, binding himself and his heirs thereto, no claim of creditors intervening, his deed operates as an effectual conveyance by way of estoppel against him or any one setting up a claim of his

¹ *Blight's Lessee v. Rochester*, 7 Wheat. 535.

² *Ward v. McIntosh*, 12 Ohio State, 344.

³ *Coakly v. Perry*, 3 Ohio State, 344.

⁴ *Merford v. Ambrose*, 39 Maine, 688; *Clendennan v. Purcell*, 3 Mo. 230.

⁵ *Mosely v. Mosely*, 15 N. Y. 334.

against the estate.¹ A widow continuing in possession of land is estopped to deny the title derived under her husband's deeds.²

¹ Carbree v. Hopkins, 43 Ala. 220.

² Grundy v. Bailey, 13 Ired. 221.

CHAPTER IX.

RECITALS.

SECTION 229. In regard to recitals in deeds, all parties to a deed are bound by the recitals therein, which operate as an estoppel, working on the interest of the land; if it be a deed of conveyance, binding both parties and privies, privies in blood, privies in estate, and privies in law. Between such parties and privies the deed or other matter recited need not at any time be otherwise proved. The recital of it in the subsequent deed being conclusive. It is such conclusive evidence that it cannot be averred against, and which forms a muniment of title. A recital of one deed in an other binds the parties and those who claim under them. It does not, however, bind strangers who claim by title paramount to the deed, or persons claiming by an adverse title, or persons claiming from the parties by title anterior to the date of the reciting deed.¹ It cannot operate on one who is neither a party or privy to it. The recitals of a deed estop only parties and privies. The recitals in a deed by which a married woman purports to convey her title to land, do not estop her, nor those claiming under, from asserting the truth against the recitals. Mutuality is a necessary ingredient of estoppels. There can be no estoppel upon one party unless the other is equally estopped.²

SEC. 230. General words do not estop, and the mere fact of assuming to convey land, by bargain and sale, or lease

¹ *Kinbro v. Hamilton*, 38 Tex. 561; *Marchioness of Anandale v. Harris*, 12 P. Wms. 432; *Shelly v. Wright*, Willes, 9; *Ford v. Gray*, 1 Salk., 285; *Ford v. Gray*, 6 Mod. 44; *Trevivan v. Lawrence*, 1 Salk., 276; 6 T.R. 171; 2 B. & Ald. 242; *Com. Dig. Estoppel*, B. & E. 10; *Co. Litt.* 352 a.; *Den v. Cornell*, 3 Johns. Cas. 174; *Penrose v. Guffin*, 4 Binn. 231; *Garwood v. Dennis*, 4 Binn 314; *Brigham v. Rogers*, 17 Mass. 571; *West v. Pine*, 4 Wash. C. C. R. 691; *Carver v. Astor*, 4 Pet. 11; *Crane v. Morris*, 6 Pet. 598.

² *Hempstead v. Easton*, 33 Miss. 142; *Schuman v. Garratt*, 16 Cal. 100; *Longwell v. Bently*, 3 Grant Cases, 177; *Towsley v. Johnson*, 1 Neb. 95.

and release, will not estop the grantor from showing that he had nothing in the land at the time on which the deed could operate. The estoppel applies where the instrument contains a definite and particular recital.¹ In order to have the effect and operation accorded to estoppels, it is not necessary that they *must be* mutual, while mutuality is a necessary ingredient of an estoppel. The existence of an estoppel to one will not be a reason for inferring that it extends to another, unless the language of the recital or the nature of the fact which it sets forth is such as to justify the belief that it was intended to serve as the basis of the whole contract, which none of the contracting parties should be at liberty to gainsay.² A specific recital will conclude the parties, if it does not bind the estate in the land, where a conveyance sets forth the facts necessary to render it valid, it is conclusive against the grantor, whatever may be its effect as between the grantee and third persons. The question of recitals in conveyances as evidence and of estoppels, often arise in the trial of actions of ejectment. The conclusive effect of recitals in deeds, is *restricted* to the recital of things in particular, as being in existence at the time of the execution of the deed; and does not extend to the mention of things in general terms. Therefore, if one bound in a bond, conditioned to perform the covenants in a certain indenture, or to pay the money mentioned in a certain recognizance, he shall not be permitted to say there was no such indenture or recognizance. But if the bond be conditioned, that the obligor shall perform all the agreements set down by A., or carry away all the marl in a certain close, he is not estopped by this general condition from saying, that no agreement was set down by A., or that there was no marl in the close. Neither does this doctrine apply to that which is mere description in the deed, and not an essential averment; such as the quantity of land; its nature, whether arable or meadow; the number of tons in a vessel chartered by the ton, or the like; for these are but incidental and collateral to the principal thing, and may be supposed not to

¹ Right v. Bucknell, 2 B. & Ad. 278; Sparrow v. Kingman, 1 N. Y. 242.

² Stronghill v. Buck, 14 Q. B. 781; Bowman v. Taylor, 2 Ad. & E. 278.

have received the deliberate attention of the parties. In England the recital of the payment of the consideration money in the deed, is regarded as conclusive and binding the parties by estoppel.¹

SEC. 231. The law in regard to recitals is fully and ably expounded,² by Mr. Justice Story, who after stating the general principles above mentioned, says, "such is the general rule. But there are cases in which such a recital may be used as evidence even against strangers; if for instance, there be the recital of a lease in a deed of release, and in a suit against a stranger, the title under the release comes in question, there the recital of the lease in such a release is not *per se* evidence of the existence of the lease. But if the existence and loss of the lease be established by other evidence, there the recital is admissible as secondary proof, in the absence of more perfect evidence, to establish the contents of the lease; and if the transaction be an ancient one, and the possession has been long held under such release, and is not otherwise to be accounted for, there the recital will of itself under such circumstances, materially fortify the presumption, from lapse of time and length of possession of the original existence of the lease. Leases like other deeds and grants may be presumed from long possession, which cannot otherwise be explained; and under such circumstances, a recital of the fact of such a lease in an old deed, is certainly far stronger presumptive proof in favor of such possession under title, than the naked presumption arising from a mere unexplained possession. Such is the general result of the doctrine to be found in the best elementary writers on the subject of evidence. It may not, however be important to examine a few of the authorities in support of the doctrine on which we rely. The case of *Marchiones*, of *Annandale v. Harris*, 2 P. Wm's. 432, and *Shelly v. Wright*, Willes. 9, are sufficiently direct as to the operation of recitals by way of estoppel between the parties. In *Ford v. Gray*, 1 Salk. 285, one of the points ruled was, "that a recital of a lease in a deed of release is good evi-

¹ *Downs v. Cooper*, 2 Ad. & E. 252; *Doe v. Payne*, 1 Id. 538.

² *Carver v. Jackson*, 4 Peters, 11.

dence of such lease against the releaser, and those who claim under him ; but as to others, it is not without proving that there was such a deed, and it was lost or destroyed. The same case is reported in 6 Mod. 44, where it is said that it was ruled, "that the recital of a lease in a deed of release is good evidence against one releaser and those that claim under him. It is then stated, that" a fine was produced, but no deed declaring the uses, but a deed was offered in evidence which did recite a deed of limitation of the uses and the question was, whether that (recital) was evidence ; and the court said that the bare recital was not evidence ; but that if it could not be proved that such a deed had been and lost, it would do if it were recited in another. This was doubtless the same point asserted in the latter clause of the report in Salkeld ; and, thus explained, it is perfectly consistent with the statement in Salkeld, and must be referred to a case where the recital was offered as evidence against a stranger. In any other point of view, it would be inconsistent with the preceding propositions, as with the cases in 2 P. Williams and Willes."

SEC. 232. "In *Trevyan v. Lawrence*, 1 Salk. 276, the court held that the parties, and all claiming under them, were estopped from asserting that a judgment sued against the party as of Trinity term, was not of that term, but of another term; that very point having arisen and been decided against a party upon a *scire facias* on the judgment. But the court there held (what is very particular to the present purpose) that "if a man makes a lease by indenture of D. in which he hath nothing, and afterwards purchases D. in fee, and afterwards bargains and sells it to A. and his heirs, A. shall be bound by the estoppel; and, that where an estoppel works on the interest of the lands, it runs with the land into whose hands soever the land comes; and an ejectment is maintainable upon the mere estoppel. This decision is important in several respects. In the first place, it shows that an estoppel may arise by implication from a grant, that the party hath an estate in the land, which he may convey, and he shall be estopped to deny it. In the next place, it shows that such estoppel binds all persons claiming the same land,

not only under the same deed, but under any subsequent conveyance from the same party; that is to say, it binds not merely privies in blood, but privies in estate, as subsequent grantees and alienees. In the next place it shows that an estoppel, which (as the phrase is) works on the interest of the land, runs with it into whosoever hands the land comes. The same doctrine is recognized by Lord Chief Baron Connyns, in his Digest, Estoppel B. & E., 10. In the latter place (E. 10) he puts the case more strongly; for he asserts that the estoppel binds, even though all the facts are found in a special verdict. But, says he, and he relies on his own authority, "where an estoppel binds the estate and converts it to an interest, the court will adjudge accordingly as if A. leases lands to B. for six years, in which he has nothing, and then purchases a lease of the same land for twenty-one years, and afterwards leases to C. for ten years, and all this is found by verdict. The court will adjudge the lease to B., good though it be so only by conclusion. A doctrine similar in principle was asserted in the court, in *Terret v. Taylor*, 9 Cranch, 52. The distinction, then, which was urged at the bar, that an estoppel of this suit binds those claiming under the same deed, but not those claiming by a subsequent deed under the same party, is not well founded. All privies in estate by a subsequent deed are bound in the same manner as privies in blood; and so, indeed, is the doctrine of Connyns's Digest, Estoppel B. and in Co. Litt. 352, *a*. We may now pass to a short review of some of the American cases on this subject, *Denn v. Cornell*, 3 John. Cas. 174, is strongly in point. There, Lieutenant-Governor Colden, in 1775, made his will, and in it recited that he had conveyed to his son David, his lands in the township of Flushing, and he then devised his other estate to his sons and daughters, &c., &c. Afterwards David's estate was confiscated under the act of attainder, and the defendant in ejectment claimed under that confiscation, and deduced his title from the state. No deed of the Flushing estate (the land in controversy) was proved from the father, and the heir at law sought to recover on that ground. But the court held that the verdict in the will, that the testator had conveyed the estate to David, was an

estoppel of the heir to deny that fact, and bound the estate. In this case, the estoppel was set up by the tenant claiming under the state, as an estoppel running with the land.

SEC. 233. "If the state or its grantee might set up the estoppel in favor of their title, then, as estoppels are reciprocal, and binds both parties, it might have been set up against the state or its grantee. It has been said at bar, that the state is not bound by estoppel by any recital of deed. That may be so where the recital is in its own grants or patents, for they are deemed to be made upon suggestion of the grantee. But where the state claims title under the deed, or other solemn acts of third persons, it takes its *cum onere*, and subject to all estoppels running with the title and estate, in the same way as other privies in estate. In *Penrose v. Griffith*, 4 Binn. 231, it was held that recitals in a patent of the Commonwealth were evidence against it, but not against persons claiming by title paramount from the Commonwealth. The court there said, that the rule of law is, that a deed containing a recital of another deed is evidence of the recited deed against the grantor, and all persons claiming by title derived from him subsequently. The reason of the rule is, that the recital amounts to the confession of the party; and that confession is evidence against himself, and those who stand in his place. But such confession can be no evidence against strangers. The same doctrine was acted upon and confirmed by the same court in *Garwood v. Dennis*, 4 Binn. 314. In that case, the court further held, that a recital in another deed was evidence against strangers, where the deed was ancient and the possession was consistent with the deed. The case also had the peculiarity belonging to the present, that the possession was of a middle nature, that is, it might not have been solely in consequence of the deed, for the party had another title; but there never was any possession against it. There was a double title, and the question was, to which the possession might be attributable. The court thought that a suitable foundation of the original existence and loss of the recited deed being laid in the evidence, the recital in the deed

was good corroborative evidence, even against strangers. And other authorities certainly warrant this decision."

SEC. 234. The law in regard to the effect of recitals and admissions in deeds seems to be well settled that as to an admission of a fact, if made for the purpose of influencing the conduct, or deriving a benefit to another; so that to deny it would be a breach of good faith; the law enforces the rule of good morals as a rule of policy, and estops the party from repudiating his representations, or denying the truth of his admissions.¹ Thus where one made a deed of land belonging to a corporation in which he described himself as agent and duly authorized to convey, &c., although it was false, he subsequently sued and recovered a judgment against the company and then brought his action to recover the land from the grantee under the deed which he had executed as agent, he was estopped to deny that he was the authorized agent, and all persons claiming through or under him were equally estopped.² So where a husband entered on land as that of his wife and held the same as tenant by curtesy, and her heirs conveyed the reversion to a third party, who brought waste against the husband, he was estopped to assert that his wife's title was defective, or to set up a title by disseisin against that under which he entered.³ So where land originally belonged to A. became, as was assumed, the property of B. by conveyance, who gave A. a power of attorney to convey any land then belonging to B., and A. under that power, and, as attorney of B., conveyed the land in question to the tenant, the heirs of A., after his death, were estopped by this sale to set up a claim to the land, on the ground that when A. made the deed as B.'s attorney, B. was not the owner of the land, but that the same, in fact, belonged to A. The attorney in such a case is estopped to dispute the title of his principal, for whom he acts.⁴ There is, however, a marked distinction between general recitals in a deed and the recital of a particular fact; the former, as a

¹ Douglass v. Scott, 5 Ohio, 99; Rawle on Cov. 407.

² Stow v. Wyse, 7 Conn. 47.

³ Morgan v. Larned, 10 Met. 53

⁴ Harney v. Morton, 36 Miss. 411.

general thing, does not conclude a party, while the latter works an estoppel.¹ One who has made a deed of grant with covenants of warranty, is estopped to show that he merely acted for the grantee, in acquiring and passing the estate, on the ground that it would permit him directly to contradict his deed.² Where a plaintiff claimed under a mortgage from the mortgagor, the defendant was the mother of the mortgagor, and claimed a life estate under the will of her husband and the mortgagor's father, the mortgagor himself being one of the devisees of the same land. The husband held a contract for the land, from the city, when he died, but no deed had been delivered, and, after his death, the city made a deed to his widow and devisees, and under this deed the mortgagor claimed his title. In this deed of the city, it was recited in the *habendum* to hold, &c., "in the manner mentioned in the said last will and testament of (the father of the mortgagor) deceased." It was held that the mortgagees claiming under the mortgagor, were estopped by the recital in his deed from the city, and could not claim adversely to the widow.³ When a deed recites the existence of facts which render it valid unless contradicted, the recital may take effect as an estoppel and thus have the effect of sustaining the conveyance as between the parties, and those claiming under them as heirs.

SEC. 235. A recital in a deed of the existence of a mortgage upon the premises, and that the grantee is to pay the debt, is conclusive evidence against the grantee of the execution of the mortgage.⁴ So a party claiming under a deed which recited the existence of a mortgage is estopped from denying that there is such a mortgage.⁵ So where there is a recital in a deed of a material fact, as that due notice had been given under a power, it estops the grantor from deny-

¹ *Huntington v. Havens*, 5 Johns Ch. 23 ; Co. Lit. 352 b. ; *Shelley v. Wright*, Willes, 9; *Norton v. Saunders*, 7 J. J. Marsh. 14; *Hays v. Askew*, 5 Jones, Law, 63.

² *Eveleth v. Crouch*, 15 Mass. 307.

³ *Jackson v. Ireland*, 3 Wend. 99 ; *Tartar v. Hall*, 3 Cal. 263. The rule does not extend to that which is merely descriptive, or an averment which is not essential. *Osborne v. Endicott*, 6 Cal. 153.

⁴ *Cane v. Ingalls*, 18 N. H. 613.

⁵ *Holmes v. Ferguson*, 1 Oregon, 220.

ing the existence of that fact.¹ So an executor is estopped from denying the recitals of a deed made by him, as to his having taken the oath of office and received letters testamentary.² A recital of title in a deed is binding upon the grantor. But a recital in a conveyance under which a party claims, cannot estop the grantor from claiming under an older conveyance or a paramount title. A grantor is estopped by his deed from denying that he had any title in the thing granted. But where a grantor is acting officially as a public agent or trustee the estoppel does not apply.

SEC. 236. While a delivery is essential to the perfection or completion of a gift, a recital under seal, that the thing given was delivered, will estop the donee and those claiming under him from disputing the title of the donee on the ground that possession did not accompany the deed.³ Where tenants in common join in a deed, each is only bound to see that his own title is recited correctly, and they will not be estopped from showing any error or mistake that may have been committed in setting up the title of the others.⁴ Ordinarily a seal is requisite to give rise to the presumption that a recital or stipulation is intended to be conclusive, and estop the parties from contradicting it in pleading or in evidence.⁵ But when a fact is specifically set forth by one of the parties to a simple contract, and constitutes the cause or inducement upon which the other relies, the former will not be permitted to controvert it, after the contract has been wholly or partially performed by the latter, or where no adequate compensation can be made for the resulting injury. The estoppel in such a case is equitable rather than a legal one, and cannot ordinarily arise, unless the party who relies upon it was ignorant of the truth and deceived by the false or erroneous allegation.

SEC. 237. When both parties claim under the same grantor, the covenants or recitals in the deeds constituting the claim of title under which each holds, will, so far as they

¹ *Simson v. Eckstein*, 22 Cal. 580.

² *Larco v. Casanuvema*, 30 Cal. 560.

³ *Newell v. Newell*, 34 Miss. 385.

⁴ *Sunderlein v. Struthers*, 47 Penn. 411.

⁵ *Davis v. Tyler*, 18 Johns. 490.

enter into and qualify the grant, be evidence for or against the other that cannot be contradicted as long as the grantor's title is the only one in question and no estate has been derived from any other source. The recital of a particular fact affecting the title conveyed by a deed is confessedly conclusive on all who derive title subsequently from the grantor.¹ Estoppels by recitals in deeds are, in some respects, as effectual as if they were actual warranties. Thus, where the deed of a grantor recited that certain conveyances had been made to him, he could not afterwards deny that they had been made; nor could one deny this who claimed under such grantor.² If a party convey land, and in his deed describes it as bounded by a street, he is estopped to deny the existence of such a street, or that the grantor might use the same in connection with the land granted.³ But the decision were based in the above cited cases, upon the fact that the grantor was, at the time of making his deed, the owner of the adjacent land described as the street or way.⁴ Where the party solemnly admits a fact by a deed under his hand and seal, he is estopped not only from disputing the deed itself, but every fact which it recites.⁵ But if a deed be made by several owners of an estate in common, whatever recital as to title it contains, estops each grantor as to his own interest only, and not as to the title of his co-grantors.⁶ A stranger to a deed can never set up the recital therein, by way of estoppel as against a party to the deed.⁷

SEC. 238. A specific recital that the grantor in a deed has a good and sufficient title, or is possessed of the estate

¹ *Van Rensselaer v. Kearney*, 11 Howard, 297.

² *Kingsman v. Loomis*, 11 Ohio, 475; *Rangeley v. Spring*, 28 Me. 142; *Farrar v. Cooper*, 34 Maine, 401; *Denn v. King*, Coxe, 432; *Doe v. Howell*, 11 Houst. 183.

³ *Parker v. Smith*, 17 Mass. 413; *O'linda v. Lathrop*, 21 Pick. 292; *Farnsworth v. Taylor*, 9 Gray, 162; *Rodgers v. Parker*, 9 Gray, 445.

⁴ *How v. Alger*, 4 Allen, 210; *Livingston v. Mayor*, 8 Wend. 85; *Bellinger v. Burial Ground Soc.*, 10 Penn. St. 137.

⁵ *Stow v. Wyse*, 7 Conn. 214; *Greene v. Clark*, 13 Verm. 158; *Sagory v. Primm*, 3 Mo. 373; *Douglass v. Scott*, 5 Ohio, 199; *Van Rensselaer v. Kearney*, 11 How. 532; *Clark v. Baker*, 14 Cal. 629.

⁶ *Sunderlin v. Struthers*, 47 Penn. St., 423.

⁷ *Allen v. Allen*, 45 Penn. St. 573.

which the deed purports to convey, estops him from denying the fact thus annexed in a subsequent action or proceeding against the grantee.¹ Recitals in an instrument are evidence against the party making them, but when immaterial to the instrument, or when the action is not founded on the instrument but is wholly collateral to it, the recitals work no estoppel.² In an English case it was held that a party to the instrument is not estopped in an action by the other party, not founded on the deed, and wholly collateral to it to dispute the facts recited, although the recitals would be in evidence.³ Where, in a deed conveying an unconfirmed claim to land, without any warranty of title, both parties recite that grantors are the owners of the claim, as the only surviving heirs and devisees of the assignee by purchase, from the original claimant, they are estopped from denying the truth of such recitals.⁴ So where a guardian of a person *non compos* sold certain real estate belonging to his ward under a license of court and conveyed the same with covenant that he was duly authorized to sell the granted premises; it was held that the guardian was estopped by such covenant, from setting up a claim in his own right to any portion of such real estate under a previous conveyance to him in his own right.⁵

SEC. 239. If a deed of conveyance, expressly or by necessary implication, affirms or recites that the grantor has and conveys a fee simple in the land, his heirs are estopped from denying that he had that estate and passed it by the deed to the grantee.⁶ But where a principal gives his agent a power of attorney to sell certain land, and the agent exceed his authority and sells land not included or described in the authority given him in the power of attorney. The principal in selling other land is not estopped by the recital in his

¹ French v. Spencer, 21 Howard, 118; Kearny v. Van Rennsalaer, 11 Id. 325; Smith v. Pendleton, 19 Conn. 107; Hassell v. Walker, 5 Jones, 270; Root v. Crook, 7 Penn. 318.

² Reed v. McCourt, 41 N. Y. 438.

³ Champlain, &c. v. Valentine, 8 Mees & Welsby, 209.

⁴ Clamorgan v. Greene, 32 Miss. 285.

⁵ Heard v. Hall, 16 Pick. 457.

⁶ Van Rennsalaer v. Kearny, 11 Howard, 297.

deed of a portion of the boundary, describing it as sold by his agent, from denying the agent's authority to make the deed.¹ So a recital in a deed that a mortgage exists, does not estop the grantee from relying upon a defence to its validity, that there is only one witness to its execution, or that part of the amount has been paid.² But an assignee of property for the benefit of creditors, is estopped from denying that persons who are named in the assignment, as creditors of the assignor, are such creditors.³ A recital in a deed that fourteen acres is all the land conveyed, estops a party deriving his title from such deed, from claiming more than that quantity of land.⁴

SEC. 240. A recital in a deed of release that a lease was duly executed and delivered may be conclusive upon subsequent creditors and purchasers and estop them from alleging that the conveyance failed from the want of an estate in the release; but they are estopped from showing that the deed was voluntary when it contains a recital that it was made for a valuable consideration; so a declaration that the grantor has a good title or was seized in fee, may be disproved by the grantee or a third person, although it may enlarge the scope of the deed and bring an after acquired estate within its operation. A statement in a grant of one tract of land with regard to another cannot estop a subsequent purchaser of the former in any controversy that may arise with regard to the latter.

SEC. 241. A grantee who accepts a conveyance reciting a prior lease or mortgage is not allowed to impeach the title of the lessor or mortgagor, on any ground that would have been open to the grantor, unless it can be shown that there is not a better title, but that it is vested by conveyance or descent in him.⁵ Where a covenant or recital in a deed to one man is so worded as to induce a third person to adopt a

¹ Rice v. Savernier, 8 Min. 248.

² Thompson v. Morgan, 6 Minn. 292; Briggs v. Seymour, 17 Wis. 255; Farmers L. & T. Co. v. Conn. Bank, 15 Wis. 424.

³ Grundy v. Vivian, 17 Wis. 436; Geisse v. Beal, 3 Wis. 367; Jones v. Jones, 20 Iowa, 388.

⁴ Jefferson v. Howell, 1 Hueston, Del. 178.

⁵ Addison v. Crow, 3 Dana, 271; Ward v. McIntosh, 12 Ohio State.

course from which he cannot recede without injury, there is sufficient privity to give rise to an estoppel.¹ In regard to wills, an heir cannot take under and in hostility to the will. If he claim under the will, he must give it effect so far as in his power, and a party claiming through deeds, which recite a will is estopped from denying its validity and genuineness.² So a recital in a will that the testator had executed a deed to the defendant, was evidence against the testator's heirs of a perfect execution of such deed, and of title in the defendant.³ So where A. accepted a grant confirmatory of a will devising him a remainder, the grantee was estopped from setting up any title inconsistent with the will.⁴

SEC. 242. The effect of recitals in deeds was considered in the case of *Douglass v. Scott*. One Massie made a deed to the heirs of one Montgomery, who had entered under an agreement for a deed, and died in possession of the land. The heirs conveyed to Kerr by deed, with warranty, reciting the patent to Massie, and Massie's deed to them. Kerr entered under this deed. Massie never received his patent, and having died, it was issued to his heirs. Douglass, prior to 1816, obtained a judgment and creditor's lien on the land against Kerr, which, being kept alive, he sold the land in 1821, and acquired a title under this sale. In 1816, Kerr mortgaged the estate, and in his deed recited the title by patent in Massie, the sale by Massie to the Montgomery heirs, and their conveyance to him. The land was sold under this mortgage and purchased by Scott, in 1823. Kerr released to him, as did the trustees of the heirs of Massie, to whom the patent issued. The deed from Massie to the Montgomery heirs was invalid for want of proper execution. Douglass brought a bill in equity to quiet his title. The court held: "That the obligation created by estoppel not only binds the party making it, but all persons privy to him,—the legal representatives of the party,—those who stand in his situation by act of law, and all who take his

¹ *Water's Appeal* 35 Penn. 523.

² *Jackson v. Thompson*, 6 Cowen, 178.

³ *Smith v. Wait*, 4 Barb. 28.

⁴ *Jackson v. Ireland*, 3 Wend. 79.

estate by contract entered into in his stead, and are subjected to all the consequences which accrue to him. It adheres to the land, is transmitted with the estate, it becomes a muniment of title, and all who afterwards acquire the title, take it subject to the burden which the existence of the fact imposes on it." They held, that Douglass acquired the legal title of Kerr by the sale under the judgment, and that the recital in Kerr's deed from Montgomery's heirs, that Massie had received a patent and had conveyed the estate to them, was one upon which Kerr had a right to hold them bound, as an admission of the fact by which, as a party to the deed, he was himself bound, and that Kerr's assignee, claiming under him, was alike concluded; that the land was patented to Massie, and conveyed by him to the Montgomery heirs, was proved by their admission while they were owners and were disposing of the estate, "upon which all persons deriving the title under them have a right to rely, and which conclude all persons to whom their estate is transmitted," and, "that neither party, deriving title through this deed, are at liberty to question these facts."¹ The recital in a patent of a prior patent, being a recital of a particular fact directly affirmed, estops one claiming under it from denying the existence of such prior patent. Wherein a deed conveying an unconfirmed claim to land, without any warranty of title, both parties had recited that the grantors in the deed were the owners of the claim as the only surviving heirs and devisees of the assignee by purchase from the original claimant, they are estopped from denying the truth of such recitals.² The recitals of a deed estop only parties and privies. In Missouri it is held that the recitals in a deed by which a married woman purports to convey her title to land, do not estop her nor those claiming under her from asserting the truth against the recitals.³

SEC. 243. The date of a deed may be contradicted, as

¹ Washburn on Real Property, 1 Douglass v. Scott, 5 Ohio, 194; McCleskey v. Leadbetter, 1 Ga. 551; Den. v. Brewer, Coxe, 172; Den. v. King, Coxe, 432; Kinsman v. Loomis, 11 Ohio, 475

² Clamorgan v. Greene, 32 Mo. 285.

³ Hempstead v. Easson, 33 Mo. 143.

not being essential to its operation, and as a general thing is not intended to be within the conclusion of a seal. But when the effect of its contradiction would be to vary the effect of the instrument or defeat any right which it was meant to confer, it becomes a recital which becomes conclusive and cannot be denied.¹ So where a covenant is made the basis of a deed or agreement, it is as conclusive as a positive averment or recital—as, for example, a description of the land conveyed by a deed as bounded by a road or street estops the grantor from denying the truth of the description, whether the way is set forth as already there or is to be laid out and opened. The object in both instances is to give certainty to a grant, and a contrary allegation would contravene, and might defeat the intention of the parties.² There are a few exceptions to the effect given to recitals in deeds, one of which is in the case where the deed containing the recital is, upon its face, a void one. There it does not work an estoppel.³ Or if it be inoperative from any cause, as for want of proper execution, even if it contain covenants of warranty.⁴ And though a party claiming title under a deed is barred by the recitals in such deed, he may show that the deed in which they are contained is inoperative, defective, and void.⁵ Another is, where the other party who would enforce the estoppel, proposes to go behind the deed which contains the recitals, to defeat it. As where one holding a mortgage took a deed of release from the mortgagor, reciting that its object was to cancel the mortgage, and a third person claimed title to the same land through an attachment laid upon it between the date of the mortgage and that of the deed of release, the grantee in such deed of release was permitted to show that he still

¹ *Kimbrow v. Hamilton*, 2 Swan, 190; *Dyer v. Ritch*, 1 Met. 180; *Curdy v. Eggleston*, 11 Mass. 282.

² *Parker v. Smith*, 17 Mass.; *O'Linda v. Lathrop*, 21 Pick. 291; 2 Gray, 271.

³ *Sinclair v. Jackson*, 8 Cow. 587; *Wallace v. Miner*, 3 Ohio, 366; *Concord Bank v. Bellis*, 10 Cush. 276; *Lowell v. Daniels*, 2 Gray, 161; *Cuthbertson v. Irving*, 4 H. & Norm. 751.

⁴ *Patterson v. Pease*, 5 Ohio, 190.

⁵ *Blake v. Tucker*, 12 Verm. 39.

held under the mortgage by an agreement with the debtor to await the result of the attachment.¹

SEC. 244. The estoppel in general extends to all the facts recited in the deed. But an exception to the conclusiveness of recitals in a deed has been allowed in the case of the recitals of the amount of the consideration and the fact of its payment. The grantor in a deed conveying in fee simple, acknowledging the receipt of the consideration, is not estopped from showing a different consideration from that expressed in the deed.² If the deed recite that the consideration was paid by a husband and wife, parol evidence is admissible to show that the money consisted of a legacy given to the wife.³ In England the recital is regarded as conclusive evidence of payment, binding the parties by the estoppel.⁴ But the general practice in the American courts has been to treat the recital of the *amount* of the money paid, like the mention of the date of the deed, the quantity of the land, and other recitals of quantity and value, to which the attention of the parties is supposed to have been slightly directed, and to which therefore the principles of estoppel do not apply; while the party is estopped from denying the conveyance, and that it was for a valuable consideration, yet the weight of the American authorities is in favor of treating the recital as only *prima facie* evidence of the amount paid in an action of covenant by the grantee to recover back the consideration, or in an action of assumpsit by the grantor to recover the price which is yet unpaid, with the exception of the states of North Carolina⁵ and Louisiana, it is the universal rule of the American courts. In Tennessee a grantor is estopped by the recitals of the deed from denying the consideration expressed in the deed; he is not estopped from proving that there were other considerations than the one expressed in the deed; it only estops him from denying that there was any consideration,⁶ and this though the deed is

¹ Crosby v. Chase, 17 Maine, 369.

² Rabsuhe v. Lack, 35 Mo. 316.

³ Doe v. Statham 7 D. & Ry. 141; Shelly v. Wright, Willes 25.

⁴ Sampson v. Corke, 5 B. & Ald. 606; Rountner v. Jacob, 2 Taunton, 141.

⁵ Mendenhall v. Parish, 8 Jones 105; Hudson v. Cutcher. Id. 285.

⁶ Perry v. R. R. Co. 5 Cald. 138.

not stated to be upon other considerations.¹ Where a deed conveying personal property acknowledges the receipt of the purchase money, this recital may be contradicted and explained by parol evidence, which shows that the money has not in fact been paid. But such evidence cannot affect the legal import of the deed.² The grantor is estopped to deny a resulting trust in his favor, or to deny that the deed was executed for the purposes expressed in it.³

SEC. 245. An officer's deed of sale under execution, is not evidence of the matter recited in it against strangers, and least of all, as against those claiming adversely to it.⁴ In a suit on a delivery bond, the return of the officer made in the original suit in relation to the disposition of the property is conclusive upon the parties; a return to an execution is always conclusive against the officer making it, but as against other parties it is generally *prima facie* evidence of the facts which it recites. Where a sheriff returns anything as a fact, done in the course of his duty in the service of a precept, it is conclusively presumed to be true against him, and he is estopped from denying it.

SEC. 246. A statement in one transaction will not be binding in another which it was not designed to influence, and to render an admission binding on the right sought to be enforced, it must have been acquired on the faith of the admission. A recital in a deed, that the consideration was pecuniary, or that it has been paid may be conclusive on a suit brought on the deed itself, or for the price of the land conveyed, but is open to contradiction when the title to other land is involved or in a proceeding instituted to test the question whether the grant was not voluntary and intended as an advancement by the grantor.⁵ Estoppels are founded on intention, and are limited by it, and cannot extend to objects which the parties can not reasonably be supposed to have had in view. A recital may therefore be

¹ Powell v. Brimfield Mfg. Co. 3 Mason, 347.

² Taggard v. Stanberry, 2 McLean, 543.

³ Kimball v. Walker, 31 Ill. 492.

⁴ Donahue v. McNulty, 24 Cal. 411.

⁵ Henion v. Cushing, 11 Ohio State, 329; Rockhill v. Sprigg, 9 Ind. 30.

an estoppel for some purposes and not for others.¹ Thus, while the consideration set forth in a deed cannot be impeached or its payment denied, in order to defeat the operation of the instrument as a conveyance, or operate to raise a resulting trust, it may, notwithstanding, be impeached so as to increase or reduce the amount or nature by parol evidence or the receipt given for it be contradicted in an action brought by the grantor for the price, or against him on the covenant for title.²

SEC. 247. A party to the deed is not estopped in an action by another party not founded on the deed, and wholly collateral to it, from disputing the truth of certain facts recited and set forth in such deed.³ When a recital in a deed is intended to be a statement which all the parties to the deed have mutually agreed to admit as true, it is an estoppel upon all. But where it is intended to be the statement of one party only, the estoppel is confined to that party, and the intention is to be gathered from construing the whole instrument.⁴ As between the parties themselves, any averment of a fact made by one of the parties in the nature of a warranty to the other, may be contradicted and shown to be false by that other. If a deed of assignment, for example, recites that the assignor is possessed of some estate or interest, such as a lease, or a patent right, and then proceeds to assign such estate or interest, and the assignee, in consideration of the assignment, enters into certain covenants upon which an action is brought, the assignee is not estopped from showing that the recital was false, and that no such estate or interest was vested in the assignor, and transferred by virtue of the deed.⁵ But the assignor himself, who makes the averment, would not be permitted to contradict or dispute the fact recited.⁶ If a lease, however,

¹ *Young v. Raincock*, 7 C. B. 310.

² *Farrington v. Barr*, 36 N. H. 86; *Hammond v. Wooman*, 41 Me. 177; *Rawle Cov.* 65, 462.

³ *Carpenter v. Bullen*, 8 M. & W. 209.

⁴ *Stronghill v. Buck*, 14 Q. B. 787; *Niles v. Woodward*, 5 Exch. 557.

⁵ *Hayne v. Maltby*, 3 T. R. 44; *Vin. Abr. Estoppel*, M. 455.

⁶ *Oldham v. Langmad*, 3 T. R. 439; *Humble v. Hunter*, 12 Q. B. 310.

recites that the lessor is possessed of real or personal property, the lessee who executes and accepts such lease is estopped, as we have previously seen, during the continuance of his occupation, from denying the title and possession of his lessor at the time such lease was executed.¹

SEC. 248. The same principle which has created an estoppel in certain cases where none would have existed at law, has, in others destroyed that which the law could have created ; for as an estoppel will be called into being for the prevention of fraud, so it will be suppressed when fraud will be produced by its existence.² This is a well established principle in courts of equity, but has been applied reluctantly in courts of common law and it has become a well established principle, that while the general estoppel of admissions under seal continue so far as to forbid an attempt to avoid the operation of a deed as a conveyance, by denying the consideration,³ it no longer exists in a suit brought for the purchase money, or to enforce the fulfilment of collateral stipulations contained in the instrument. In all such cases, the general operation of the deed being left untouched evidence may be given to vary the consideration both in amount and character,⁴ or to show that it was not paid in opposition to a recital in the instrument or the accompanying receipt that it was ;⁵ and the deed held conclusive at law of the nature of the consideration, although not that it was paid,⁶ and liable to be impeached in equity on the ground of fraud,⁷ the real consideration may be shown to be natural love and affection, while the deed purports to be made for value or a sum certain set forth on its face,⁸ while the deed is the

¹ Beckett v. Bradley, 8 N. H. 843.

² Pendleton v. Richey, 32 Penn. 58.

³ Farrington v. Barr, 36 N. H. 86 ; Wiatt v. Franklin, 1 Bin. 562 ; Grant v. Townsend, 2 Hill, 557.

⁴ Goodspeed v. Fuller, 46 Me. 141 ; Jones v. Jones, 12 Ind. 389 ; Harrison v. Casbier, 11 Ohio, 833 ; Holbrook v. Holbrook, 30 Vt. 532 ; Swafford v. Whipple, 3 Iowa, 261.

⁵ Reynolds v. Wilas, 8 Wis. 471 ; Harwell v. Fitts, 20 Geo. 723 ; Vaugner v. Taylor, 18 Ark., 65 ; Hair v. Lyttle, 28 Ala. 236 ; Hill v. Perry, 3 Jones, 579 ; Belden v. Seymour, 8 Conn. 210 ; Buckley's Appeal, 48 Penn. 494.

⁶ Shepard v. Little, 14 Johnson, 210.

⁷ Hildreth v. Sands, 2 Johnson, Ch. 35 ; Morse v. Shattuck, 14 N. H. 229.

⁸ Rockhill v. Sprigg, 9 Ind. 30 ; Harrison v. Castner, 11 Ohio, § 339.

execution of the contract of sale, it is not the contract, the object of the deed being to transfer the title to the purchaser and not to state the terms of the purchase.¹ The estoppel will therefore be limited as in other cases, to the object the parties have in view, and will not extend to other and collateral matters, forming part of the same transaction. There could be no greater wrong inflicted than in treating formal receipts introduced into conveyances for the benefit and convenience of grantees in order to facilitate the transfer of the title to subsequent purchasers, as conclusive evidence, in opposition to the truth of the case and understanding of the parties.² But in Maryland the stringent common law rule still prevails; the consideration cannot be disproved by parol evidence or shown to differ from the description given of it in the deed.³ The estoppel arising from recital of the nature or judgment of the consideration is ordinarily confined to the parties and does not extend to third parties as creditors, or to the heirs of the grantor.⁴ But where a grantor who has put a deed upon record in which there is a recital that the consideration was paid, or acknowledging the receipt of it will be estopped from showing that it was not paid as against third persons who have given credit or taken a conveyance in reliance upon the admission or acknowledgement of the receipt of such consideration contained in the deed,⁵ and a recovery of a purchaser on a warranty contained in a grant to the vendor, cannot be reduced below the amount set forth in the deed as having been paid by the grantee.⁶ A recital in a deed that the purchase money had been paid was held conclusive on the grantor in favor of subsequent judgment creditors who might reasonably be supposed to have been influenced by it in trusting the grantee or giving him time.⁷

¹ *White v. Miller*, 22 Verm't, 380; *Bolles v. Beach*, 2 N. J. 680; *Winans v. Peebles*, 33 Barb. 371; *Thompson v. Thompson*, 9 Ind. 323.

² *Eckels v. Carter*, 26 Ala. 563; *Collins v. Tillyou*, 26 Conn. 368; *Lindsay v. Lovely*, 26 Verm't, 123; *Dickinson v. Kelly*, 3 Blackford, 189.

³ *Small v. Baxter*, 2 Md. Ch. 454; *Ellenger v. Cromell*, 17 Md. 357.

⁴ *Meeder v. Meeder*, 6 Conn. 83; *Rockhill v. Sprigg*, 9 Ind. 30.

⁵ *Work v. Brayton*, 5 Ind. 396; *Waters' Appeal*, 35 Penn. 503.

⁶ *Hunt v. Crary*, 17 Ill. 73; *Greenwault v. Davis*, 4 Hill, 643.

⁷ *Waters' Appeal*, 35 Penn. 523.

SEC. 249. So a man may be estopped by a matter of writing, which is not of record. An admission under seal is conclusive upon the obligor and estops him from asserting or proving to the contrary. Thus if a condition in a bond recite that a particular suit is pending in the Court of the King's Bench, the obligor is estopped from saying there is no such suit there.¹ So if the condition of a bond be to perform the covenants in a particular indenture, the obligor is estopped by his deed from saying that there is no such indenture. Where a distinct statement of particular facts is made in recitals in a bond or other instrument under seal and a contract is made with reference thereto, it is not competent for the parties bound by the deed to deny the recital in an action between them.² Where a statute requires a bond to be taken in double the value of the thing concerning which it is executed, and the parties voluntarily and without fraud assent to the insertion of a given sum as equal to double the value, they are estopped from denying that it is double the true value, there being no pretense or allegation that it was obtained by fraud, oppression or circumvention.³ In a suit upon a forthcoming bond for goods attached, the obligors are estopped from denying admissions made in the bond or controverting their existence. No evidence is needed to prove that there was a levy, the judgment is conclusive evidence of the levy. So if a condition be that he shall pay a sum of money for which he is bound in a particular recognizance, he is estopped from denying that there is such a recognizance.

SEC. 250. No one who has bound himself by an instrument under seal for the fidelity and good conduct of another in a private trust or public duty, can escape from the liability thus assumed under cover of an allegation that his principal was not duly designated, or elected, or was subject to some legal disqualification which should have prevented him from accepting or administering the office.⁴ Thus in a suit on a sheriff's bond, the defendants are estopped by their own

¹ Cro. Eliz. 756.

² Bonner v. Wilkinson, 5 B. & A. 682.

³ Speake v. U. S., 9 Cranch, 28.

⁴ People v. Norton, 5 N. Y. 176 ; Seiple v. Elizabeth, 3 Dutch, 407.

acknowledgment on the bond, from denying that the person described therein as sheriff was such at its date, and the law will presume that he continued so during the term for which he was elected.¹ Where one has voluntarily signed a guardian's bond which has been accepted by the probate court he is estopped to set up that the court did not order it made.² The sureties in an official bond are estopped to deny the official character of their principal. And upon a suit brought upon the bond a tax collector and his sureties are estopped to deny his official character therein recited.³ When the principal and surety bind themselves jointly and severally on a bond, although there is no express admission on the face of the instrument that all are principals, the surety is estopped in an action at law that he is principal. The same rule applies in equity unless it is shown that there was fraud or mistake.⁴ The recital in an official bond estops the obligor from denying it, and it is not necessary to produce the commission of the officer or a copy thereof. In an action upon⁵ a prison-bonds bond the defendant is estopped to deny the existence of such a judgment as that recited, and the plaintiff need not produce the judgment record.⁶ Where a bond is given by A. at the request of B., and this fact is expressly recited in their bond, A. cannot question its validity; he is estopped by his bond, and where parties bind themselves as principals, they are estopped from denying facts which they have solemnly admitted under their seal. Where the owner has a ship which has been attached delivered up to him upon an appraisement, and he gives a stipulation according to the course of admiralty proceedings to refund that value, together with damages, interests and costs, he is not at liberty to insist afterwards that the ship is of less value in his hands, or that he has discharged other liens diminishing the value, for

¹ *Norris v. State*, 22 Ark. 524; *State v. Surgart*, Id. 528; *Edward v. State*, Ib. 303.

² *Sebastian v. Bryan*, 21 Ark. 447.

³ *Parker v. Campbell*, 21 Tex. 763; *Burnett v. Henderson*, 21 Tex. 585.

⁴ *Sprigg v. Bank of Mt. Pleasant*, 10 Peters, 257; same case, 14 Pet. 201; *S. C.*, 1 McL. 178 & 384.

⁵ *Bruce v. U. S.*, 17 How. 437.

⁶ *Allen v. Magruder*, 3 Cranch, C. C. R. 6.

which the owners were personally liable *in solido* in the first instance.¹

SEC. 251. *Sureties* in an *undertaking* which purports to have been given upon an application to discharge an attachment, are estopped from denying recitals in the undertaking, which state that an attachment was issued, and that an application had been made for its discharge.² The sureties in an administration bond are estopped by a recital that their principal had been duly appointed, from denying that the fact was as averred,³ and also in a bond where there was a recital that one of the obligors was sheriff and the others were his deputies.⁴ In like manner the obligor in a bond, conditioned for the performance of the covenants in an indenture, or the faithful discharge of the duties of an agent, will not be allowed to prove or allege that there is no such deed or agency as the condition avers.⁵ In such cases the estoppel is equitable as well as legal, because it would be unjust to permit a person who has aided another to obtain access to a place by a pledge that he will behave himself properly when there, to point out the reasons why he should not have been admitted, after it was too late to correct the error; and while a recital couched in general terms or relating to past transactions, will not ordinarily operate as an estoppel, no statement can be contradicted which was meant to be a basis of a contract or conveyance, and is necessary to render it effectual.⁶

SEC. 252. A recital or allegation in a title, that A. had purchased out all the rights of his said son in said firm, estopped the complainant from questioning that fact.⁷ If a vendor states under seal that he has "bargained, sold, and delivered" the property to the vendee, he is estopped in an

¹ The Virgin v. Vyffkins, 8 Peters, 538.

² Coleman v. Bean, 3 Keyes, 94; S. C. 32; How. Pr. 370.

³ Cutter v. Dickinson, 8 Pick. 887.

⁴ Cox v. Thomas, 9 Grattan, 312; Cecil v. Early, 10 id.

⁵ Washington Ins. Co. v. Colton, 20 Conn. 42; Collins v. Mitchell, 5 Fla. 364.

⁶ Shelley v. Wright, 9 Willes, 11; Young v. Raineck, 7 C. B. 310; Brimnegar v. Chaffin, 3 Dev. 108; Stronghill v. Buck, 14 Q. B. 771; Jackson v. Waldron, 13 Wend. 178.

⁷ Armstrong v. Fahnestock, 14 Md. 55.

action of trover brought by the vendee for the property, to deny the delivery.¹ A master of an apprentice is estopped by the recital in the indentures as to the age of the boy.² A covenant expressed by way of recital is as obligatory as if expressed in the body of the agreement.³ A party giving a receipt for property seized by an officer upon an execution or attachment, is estopped from setting against the officer that the property was his own, or that of any other person than the execution or attachment debtor; nor can he show that the property was worth less than the debt, which in default of returning the property he covenanted to pay.⁴ His liability to the officer is as broad as his covenant, and is absolute and dischargeable only by act of God or the public enemy. But the obligation ceases to be binding as soon as the goods are surrendered, and leaves the obligor free to show who is the owner, in any subsequent proceeding.⁵ It is not essential to the estoppel of instruments under seal that the admissions should be made in terms; it is sufficient if the intention of the parties is to place the existence of a fact beyond question or make it a basis of the contract is so clearly expressed, as to leave no room for doubt. Thus a condition in a bond that one of the obligors shall well and faithfully execute his office, as collector, estops him from denying that he held the office or was bound to discharge the duties with fidelity, although the bond does not recite or allege that he was collector, and leaves that fact to be gathered by implication.⁶ A recital in a will operates as an estoppel to parties claiming under it. Where the defendant made a deed stating⁷ that he had bargained, sold, and *delivered* certain personal property to the plaintiff, he was held to be estopped from denying the delivery in an action of trover.⁸ A receipt

¹ Nevett v. Berry, 5 Cranch, C. C. R. 291.

² McCutchin v. Jameson, 1 Cranch, C. C. R. 348.

³ Bealle's adm'rs v. Shoals' ex'rs, 1 A. K. Marsh, 475.

⁴ Cornell v. Dakin, 38 N. Y. 253.

⁵ Norris v. Norris, 19 Ark. 319; Decherd v. Blanton, 3 Sneed, 373.

⁶ Billingsly v. State, 14 Md. 369.

⁷ Den v. Cornell, 3 John. Cas. 174.

⁸ Newett v. Berry, 5 Cranch, C. C. R. 291.

that declares, that this receipt shall be conclusive evidence against me, as to the receipt of property, its value and my liability under all circumstances to said officer, estops the receiptor from denying that the property was the debtor's, and the officer, in an action against him by the creditor for refusing to deliver the property attached, to be taken on execution, is estopped from setting up as a defence, that the property did not belong to the creditor but to the receiptor.¹

SEC. 253. There is a distinction between the effect of a particular and *general recital*. It is laid down² that if the condition of the bond contain a generality to be done, the party shall not be estopped to say that there was not any such thing, as if the condition of a bond be to perform; all agreements set down by A., the obligor may say that there was no agreement set down by A. for the condition is general, or if it be to carry away all the marl in a close, he may say there was no marl there. But in all cases where the condition of a bond has reference to a particular thing, the obligor shall be estopped to say that there is no such thing. The reason of this rule seems to be the same as that heretofore laid down in reference to estoppels by matter of record, that is that an estoppel must be certain."

SEC. 254. A mere general recital cannot control the plain words of the granting part of a deed. Where a deed of assignment by a debtor, in trust for creditors, recited that the debtor was desirous to convey his property to secure three of his creditors named, in full, and the residue for the benefit of his other creditors, and in the body of the deed, the assignment was expressed to be in trust to pay and satisfy those three creditors, and three others named, and the surplus divided among his other creditors, it was held that the three creditors named in the recital, were only entitled to be paid ratably with the other three creditors, in proportion to their demand out of the proceeds of the property assigned. The general recital here was of an *intention* which

¹ Brown v. Gleed, 33 Vt. 147; Hill on Torts, 225.

² In 1 Rolle's Abridgement, Estoppel 872.

was inconsistent with the plain language of the instrument, and could not control the latter.¹ A joint or joint and several obligor, may aver that he is, in point of fact, a surety, and set up any act of the creditor tending to impair the right of recourse for indemnity against the principal as a defence to an action for the recovery of the debt, for the reason that a plea of this kind does not consist in a denial of the terms of the contract, but in showing the existence of certain collateral relations between the parties which the creditor has impliedly sanctioned and is therefore bound to preserve uninjured.² This is especially applicable in equity when the language of an obligor is so clear as to leave no doubt that the obligors intended to be or were meant to be primarily liable, the seal estops any contrary allegation, and a surety who binds himself expressly as principal, and not as surety, is estopped at law and will be precluded in equity from denying that his true character is in accordance with the terms of the instrument.³

SEC. 255. In the absence of any contract as to novelty or usefulness or value of any invention, the recitals in the letters patent granted by the United States, that it is a new and useful invention is conclusive in state courts.⁴ An agreement made with a patentee to manufacture his machines under his patent upon certain conditions mentioned therein, and making and selling such machines under the patentee's title, estops the manufacturer from alleging the invalidity of the patent as a defence to an action by the patentee for an account under the contract.⁵

¹ *Huntington v. Havens*, 5 John. Ch. Ib. 23.

² *Brook v. Harris*, 21 Pick. 195; *Stone v. Compton*, 3 M. & W. 583; *Bank &c. v. Leavitt*, 6 Ohio, 17; *Stone v. Bing*, N. C. 162; *F. & M. Bank v. Rathbone*, 26 Vt. 19; *Bell v. Banks*, 3 Scott N. R. 503.

³ *Sprigg v. Bank of Mt. Pleasant*, 14 Pet. 207.

⁴ *Elmer v. Pennell*, 40 Me. 430; *Ball v. Murray* 10, Penn. 113.

⁵ *Kingsman v. Parkhurst*, 18 How, 289.

CHAPTER X.

TITLE BY ESTOPPEL.

OF THE RULE THAT THE INTEREST WHEN IT ACCRUES FEEDS THE ESTOPPEL.—AFTER ACQUIRED TITLE ENURES TO THE BENEFIT OF THE GRANTEE.—EXCEPTIONS TO THIS RULE.

SECTION 256. The ordinary effect of an estoppel is confined to precluding parties from contradicting the recital or admission on which the estoppel is founded, and this is implied from the definition of the word. The most striking instances of an estoppel by deed are where a party without any title to land undertakes to convey it covenanting as to title, and afterwards acquires title to the same land by descent or purchase. In such cases, arising on the conveyance of land, it acquires a further and transcendent power which binds the estate and confers a title where none passed originally by operation of the deed. If a grantor's covenant is of warranty and entitles a covenantee to recover for its breach just as much of the covenantor as he, the covenantor would recover of the tenants of the covenantee, if he prevailed by enforcing his claim to the land, the law to avoid circuitry of action, permits the tenant to avail himself of this covenant to rebut the covenantor's claim upon the land, and prevents the grantor from setting up a claim to the estate by his after acquired title.¹ Perhaps a more proper mode of stating it would be, that the warranty of the grantor is as if a particular recital or averment had been inserted in his deed, and he was thereby estopped from asserting its efficacy.² While an estoppel will not grow out of a recital unless it is direct and precise, and manifests an intention to render the fact set forth a part or basis of the conveyance or agreement. A recital that a grantor has a

¹ Washburn on Real Property.

² Rawle on Cov. for Title.

particular estate or owns the interest which the deed purports to convey, will not only estop him and his heirs from denying what he has thus averred, but will take effect on any title to the land which he may subsequently acquire, and transfer it to the grantee.¹ If a vendor has no title at the date of his deed, but acquires a good title afterward, the title thus acquired enures to the benefit of the first vendee by estoppel.² So where one conveys lands with warranty, but without title, and afterwards acquires one, his first deed works an estoppel, and passes an estate to the grantee, the instant the grantor acquires his title, not only against the grantor and those claiming under him, but also against strangers who came in after the deed creating the estoppel.

SEC. 257. There were two classes of cases in which an estate actually passed by estoppel under the old civil law. The first was where the mode of assurance was a feoffment, a fine or a common recovery. Such was their solemnity and high character, that they always passed an actual estate, and divested the feoffor or comisor not only of what he then had, but of every estate which he might thereafter, by any possibility acquire.³ And this principle has been applied in modern times.⁴ The second class of assurances which passed an after-acquired estate by way of estoppel, were leases, which, it will be remembered, were susceptible of taking effect *in futuro*; and the estoppel seems to have been put upon the ground of such having been the contract or agreement between the parties, the same contract which implied a covenant for quiet enjoyment from the word *demise* on the part of the lessor. And a covenant for payment of the rent from the words *yielding* and *paying* on the part of the lessee.⁵ These modes of assurance seem to have been the

¹ French v. Spencer, 21 Howard, 228.

² Corcoran v. Brown, 3 Cranch, C. C. R. 143; Bush v. Marshall, 6 Howard, 284; Barr v. Gratz. Heirs, 4 Wallace, 215.

³ Shepard's Touch, 204, 210; Co. Lit. 9 a, 49 a; Plowden, 423.

⁴ Doe d. Christmas v. Oliver, 5 Mann. & Ryl. 202; S. C. 10 Barn. & Cress. 182; Helps v. Hereford, 2 Barn. & Ald. 242; Doe d. Thomas v. Jones, 1 Crompt. & Jerv. 528.

⁵ Bac. Abr. tit. Leases, 296, 441; Rawlyn's Case, 4 Coke, 53; Weale v. Lower, Pollexfen, 60; Smith v. Low, 1 Atkyns, 490; Trevivan v. Lawrence, 1 Salkeld, 276; Wells v. Austin, 7 Manning & Granger, 701; McKenzie v. City of Lexington, 4 Dana, (Ken.) 129.

only ones by which an after-acquired title was actually passed by direct operation of law under the doctrine of estoppel. Thus a grant or a lease had not this effect. They only operated upon the estate which the grantor or releasor actually had, "and therefore if a man grant or rent a charge out of the manor of Dale, and in truth he hath nothing in that manor, and after he purchases the manor, yet he shall hold it discharged,"¹ and this applied equally to a release. No other forms of conveyance, in the absence of covenants of warranty, had any effect in transferring the title subsequently acquired. In this country no greater effect is given to a grant or a conveyance by bargain and sale, or lease or release, unaccompanied with covenants of warranty, than in England under the statute of uses. They pass only the estates which are vested in interest at the time, and do not bind or transfer, by way of estoppel, future or contingent estates.²

SEC. 258. Where it distinctly appears, in a conveyance, either by a recital, an admission, a covenant, or otherwise, that the parties actually intend to convey and receive, reciprocally, a certain estate, they are estopped from denying the operation of the deed, according to its intent.³

There was then an ordinary and an extraordinary effect attached to an estoppel. The one was personal in its character, like the rebutter in a warranty, and estopped the grantor and his heirs from doing or alleging anything contrary to the tenor and effect of his sealed instrument. The other, besides this quality, possessed the high function of actually transferring every estate, present or future, vested or contingent, to the feoffee, conusee, or lessee, according as the mode of assurance employed was a feoffment, a fine or a

¹ Perkins, tit. "Grant," § 65, Wivel's Case, Hobart, 45; Touch, 240; Lampet's Case, 10 Coke, 48.

² Kennedy v. Skeer, 3 Watts, (Pa.) 98.

³ Goodtitle v. Bailey, Cowper, 559; Doe v. Errington, 8 Scott, 210; Bownan v. Taylor, 2 Adolph & Ellis, 278; Carver v. Astor, 4 Peters, 86; Kearney v. Van Rennsalaer, 11 Howard, 325; Smith v. Pendleton, 19 Conn. 107; McBurney v. Cutter, 18 Barbour, 208; Root v. Crock, 7 Penn. 380; Kinsman v. Loomis, 11 Ohio, 478; Williams v. Presbyterian Society, 1 Ohio State R. 478; Den v. Brewer. Coxe, 172; Ducker v. Caskey, 2 Green's Ch. 449; Fitzhugh's heirs v. Tyler, 9 B. Monroe, 561; Williams v. Claiborne, 1 Smedes & Marsh, Ch. 365.

lease; and this effect was peculiar to them alone, there being no authority in any of the English books to show that it was produced by any other species of conveyance.¹

An estoppel can hardly be regarded as a distinct mode of acquiring real estate, because it is not by itself a transfer or assurance, but depends as a secondary incident upon other direct alienations while it gives to them a peculiar and distinctive operation.

SEC. 259. The rule that there can be no estoppel where an interest passes is peculiarly applicable, and in fact derives its operation from estoppel by deed. Thus, while a lessee is estopped from showing that his lessor had no title to the premises demised, yet he may show that he was entitled to a particular estate which has expired. Whether an after acquired interest will pass by the estoppel of a prior conveyance, depends upon the meaning of the deed as manifested by its language; and when the intention is to convey the land and not merely the title which the grantor has at the time, an estoppel arises and renders it effectual; whether the object in view appears from the covenants or recitals in the deed will make no difference if it is disclosed with sufficient clearness, and an allegation that the grantor has or agrees to convey a good and sufficient title will be equally effectual with an agreement to warrant or protect the right or enjoyment of the grantee.

SEC. 260. The effect of a deed depends on its meaning as collected from its language, and whether its operation should be limited to the interest which the grantor has at the time, or extend to that which he may subsequently acquire, will depend on all the recitals and stipulations which it contains, rather than on the effect of any particular clause in the words of grant by which the title is passed or the covenants by which it is assured and fortified. Therefore, any covenant which like that of further assurance or quiet enjoyment indicates that the intention of the grantor was to convey the land absolutely, and not merely such title as the grantor had, is as effectual as an absolute warranty in binding an after

¹ Doe v. Olive, 10 Barn. & Cr. 181.

acquired interest in equity (in England) and in (this country) at law, while the limitation of a covenant of warranty or for title may not only restrict its own operation, but afford ground for an inference that the operation of the deed is equally limited; yet the purpose of the parties may have been that the grant should extend to future as well as present estates or interest, without making the grantor answerable for the goodness of the title conveyed at the time. When such intention is apparent, it should be carried into effect without regard to the manner chosen for its expression. Whenever the terms of the deed or the covenants which it contains clearly show that it was meant to convey an absolute and indefeasible title, and not merely that which the grantor had at the time, it will bind or pass every estate or interest which may vest in him subsequently to its execution, whether the warranty it contains be general or special, and although it may contain no warranty whatever.¹ If the seisin or possession of a particular estate is affirmed in the deed either in express terms or by necessary implication, the grantor and all persons in privity with him are estopped from ever afterwards denying that he was so seised and possessed at the time he made the conveyance. The estoppel works upon the estate and binds an after acquired title as between parties and privies. By the statute of California conveyances under the statute of uses, where a fee simple absolute is conveyed in land, of which the grantor has no legal estate at the time of making such conveyance, and the grantor subsequently acquires title to the same, the estate so acquired passes at once to the original grantee, creating in him a valid title and estate. And this applies to cases of mortgage estopping the mortgagor, and his privies from setting up against his own mortgagee an after acquired title to the estate.²

SEC. 261. Some forms of conveyance operate as an estoppel against those who make them, from their very nature, as

¹ Fairbanks v. Williamson, 7 Greenlf. 96; White v. Erskine, 10 Maine, 360; Trull v. Eastman, 3 Met. 121; Bean v. Welsh, 17 Ala. 722; Wightman v. Reynolds, 24 Miss. 689.

² Clark v. Baker, 14 Cal. 612; Van Rensselaer v. Kearney, 11 How. 322; Bogy v. Shoab, 13 Mo. 379; Cooke v. Brogan, 5 Ark. 699; Frink v. Darst, 14 Ill. 308; Morrison v. Wilson, 30 Cal. 317.

is the case of a feoffment. Others, as a simple release, have no effect beyond passing or extinguishing whatever interest the releasor has at the time. Others operate by way of estoppel, by reason of the covenants as to title they contain. A party to a deed is estopped to deny anything stated in the deed which has operated upon the other party as the inducement to accept and act under such deed, and this extends to facts stated in other deeds referred to directly, or by way of recital. Thus, a feoffment, by a person who is not the owner of lands, passes of necessity a fee by wrong or disseisin. It binds the feoffor for life, by estoppel, so that he cannot claim the right, should it descend to him, against his own feoffee. He cannot purchase the fee, since his feoffment is a disseisin. But it is an estoppel only to him personally, and will not bind his heirs. Lord Coke says, there is a diversity between a feoffment and a warranty. A feoffment is good against the feoffor, but not against his heirs; a warranty is good against one and his heirs. As far as the heir claims as heir, he may be barred by force of the warranty as a rebutter, though not bound by the feoffment. Thus, if an heir apparent makes a feoffment in the life of his ancestor, of land which afterwards descends to him, he is estopped to set up a title against his feoffee.

SEC. 262. A deed of simple release passes only such interest or estate as the releasor has at the time, and never operates by way of estoppel to convey any interest which he may afterwards acquire. In order to prevent maintenance and the multiplying of contentions, as stated by Lord Coke, it was an established maxim of the common law, that no *possibility*, right, title, or any other thing that was not in possession or *vested* in right, could be granted or assigned to strangers.¹ Thus a simple release by an heir apparent of his chance of succession, though made by deed, will not bar his title when it accrues.² So one who has a contingent remainder, an interest by way of executory devise, or a possibility like that of an heir apparent, even though he may not at common law make a grant of such an interest by deed

¹ Co. Lit. 265 a, note, 212.

² 1 Prest. Abst. 302; 2 Prest. Conv. 268.

so as to pass the same distinctly, may convey the estate out of which his interest is to arise, in such a manner that this will operate as an estoppel, and prevent his claiming such interest when it arises. Thus equity holds a contract of an expectant heir, who becomes heir *de facto*, binding on him, though equity does not extend this to his heir.¹ In order to work an estoppel in such cases, there must be either a grant or release, with a general covenant of warranty, or an express affirmation in the grantor's deed of there being an estate such as he assumes to convey.² The estoppel of a conveyance is founded on the intention which it manifests to convey, and arises whenever the instrument, taken as a whole,³ shows that the agreement was that the grantee should have a good title and not merely that which the grantor had when the deed was executed. A covenant that any title that might afterwards be acquired by the grantor, should enure to the benefit of the covenantee, was held to bind and pass a subsequent estate immediately upon its acquisition by the grantor, not only as between the parties, but as against all the world.

SEC. 263. Where one makes a deed of land covenanting that he is the owner, and subsequently acquires an outstanding and adverse title his new acquisition enures to the grantee on the principle of estoppel, and where a person buys land and pays for it, and there is a deed made subsequently to the grantee in consequence of his purchase, it does not confer a new title on him but confirms the right which he had before the deed was made,⁴ so one who conveys without title is estopped from claiming it, if he afterwards acquire it. So where one received the legal title of land for the benefit of certain creditors of the owner thereof, he can not afterwards set up any title which would affect the trust.⁵ A patent is necessary in order to pass a perfect and consummate legal

1 2 Prest. Abst. 210; 2 Prest. Conv. 268, 271; Hayne v. Maltby, 3 T. R. 438 Purefoy v. Rogers, 2 Sand. 388; Fitch v. Fitch, 8 Pick. 483; Stoven v. Eyesheimer, 46 Barb. 84.

2 White v. Patten, 24 Pick. 324; Wight v. Shaw, 5 Cush. 56.

3 Phillips v. Kellogg, 15 Ill. 131.

4 Irvine v. Irvine, 9 Wallace, 617.

5 Paul v. Oliphant, 14 Penn. 342.

title to public lands. But when granted it enures to any one to whom the patentee is bound to convey the land or for whose use he ought to hold it.¹ Any title subsequently acquired by the grantor who conveys by warranty, will enure to the benefit of the grantee. But grants made by the grantor on conditions or limitations, or estoppels subsequently attempted to be annexed to the estate, will not affect his grantee.² If the vendor in a conveyance of land has no title at the date of the deed, but acquires a good title afterwards, the title thus acquired enures to the benefit of the first vendee against a subsequent vendee, who claims by a deed made after the title accrued to the vendor, and the vendor and all who claim under him are estopped by his first deed to deny that the vendor had title at the date of the deed.³ Thus where a patent issued to the original beneficiary under a bounty act, who had previously sold and assigned his right, it enures to the benefit of the purchaser, and relate back to the date of the entry. The heir of the grantor, the beneficiary, is estopped from setting up a legal title under the patent. If a person sells land, or an interest of land, and takes pay for it, and covenants for the title, while he has no title and none actually passes, his covenant runs with the land, and estops him whenever he acquires title.⁴ Thus where a man demised land, in which he had nothing by indenture, the lease was destitute of effect at the time as it regarded third persons, and only valid between the parties because they were estopped from showing the truth; but when a term of twenty-one years subsequently vested in the lessor, the estoppel bound the interest thus acquired and rendered the title of the lessee good against all the world.⁵

SEC. 264. In addition to the more usual effect of an estoppel in precluding the right to show that the deed did not pass the estate, there arose another by which the estate was passed in conformity to the deed. In *Doe v. Oliver*,⁶ where

¹ *Green v. Litter*, 8 Cranch, 229; *Lindsay v. Lessee of Miller*, 6 Peters, 677.

² *Pope v. Henry*, 24 Vt. 560.

³ *Corcoran v. Brown*, 3 Cranch, C. C. R. 143.

⁴ *French v. Spencer*, 21 Howard, 228.

⁵ *Rawlins' case* 4 Coke, 52.

⁶ 3 M. & R. 202.

it had been contended that as the comisor had no vested estate when the fine was levied, it only concluded the parties and privies, and did not bind the defendant who claimed as a stranger, the court held that the estate which subsequently accerued, fed the estoppel and passed by the operation of the fine. Nothing which is not possessed can be granted, but may yield to the force of an estoppel, a deed which purports to convey land absolutely and without qualification, will not only estop the grantor from recovering in opposition to the grant, but transfers any estate or interest which he may subsequently acquire, whether it does or does not contain a covenant of warranty, or for quiet enjoyment, or a recital that he has good title to the premises conveyed.¹

SEC. 265. The old rule of law was : where one by a deed of bargain and sale, or lease and release, conveyed to which he had no title, he was estopped by his deed from claiming an after acquired title in it.² But this rule has been repeatedly set aside, and the law at the present time is, that where one conveys land to which he has no title by deed of bargain and sale *without a covenant of warranty*, a subsequent acquired title will enure to the benefit of the bargainee even as against the bargainor and his heirs.³

SEC. 266. But, while a conveyance by deed works no estoppel that can bind future estates or even conclude the grantor or those claiming under him from recovering in opposition to the grant ; a different result follows and is caused by the presence in the deed of a covenant of warranty. The estoppel of a conveyance depends wholly on the presence or absence of the warranty. A warranty creates an estoppel which not only binds the grantor but takes effect on every subsequent interest which he acquires, and transfers it immediately to the grantee.

SEC. 267. It has been decided in Maine, that a covenant

¹ Henderson v. Hackney, 23 Geo. 383 ; Brown v. McCormick, 6 Watts, 610 ; McCall v. Coover, 4 W. & S. 151 ; Root v. Cook 7 Penn. 380 ; Nixon v. Carco, 28 Miss. 414.

² Jackson v. Bull, 1 John. Cases, 81.

³ Sparrow v. Kingman, 1 N. Y. 247 ; Comstock v. Smith, 13 Pick. 116 ; Ham v. Ham, 14 Maine, 351 ; Funk v. Dart, 14 Ill. 308 ; Tillotson v. Kennedy, 5 Ala. 413.

of non-claim, viz.: A covenant that neither the grantor nor any other person shall or will have, claim or demand any right or title to the premises, is not such a covenant as will support an action against the party making it, and hence that it will create no estoppel.¹ Such a construction given to this covenant has not, however, been elsewhere adopted, it being generally considered as synonymous with a covenant of warranty.² Any after acquired estate will enure by virtue of the warranty, to the party claiming under such conveyance, with the same effect as if it had been originally passed by it. Thus, where one having granted land to his father, afterwards mortgaged the same land with a covenant of warranty, it was held that upon the death of the father, and the descent of the moiety of the estate upon himself as one of his father's heirs, the mortgagee took that moiety by estoppel.³ So where an heir gave a release of his expectant estate, with a covenant that neither he nor those claiming under him should ever claim any right to the same, it was held that when the estate devolved upon him, it immediately enured by estoppel to the grantee.⁴ It is a well settled principle of the common law, that if one conveys lands or other real estate, with a general covenant of warranty against all lawful claims and demands, he cannot be allowed to set up against his grantee or those claiming under him, any title subsequently acquired, either by purchase or otherwise. Such new title will enure, by way of estoppel, to the use and benefit of his grantee, his heirs and assigns. This principle is founded in equity and justice, as well as the policy of the law. It is just that a party should not be permitted to hold or recover an estate in violation of his own covenant; and it is wise policy to repress litigation and to prevent a

¹ Pike v. Galvin, 29 Maine, 185; Loomis v. Pingree, 43 Maine, 314.

² Trull v. Eastman, 3 Metcalf, 121; Miller v. Ewing, 6 Cushing, 34.

³ *Somes v. Skinner*, 3 Pickering, 52.

⁴ Trull v. Eastman, 3 Metcalf, 121; Carbrey v. Willis, 7 Allen, 364; Gouchenor v. Moury, 33 Ill. 331; Sparrow v. Kingman, 1 N. Y. 247; Baxter v. Bradbury, 20 Conn. 260; Williams v. Thurlow, 31 Me. 295; Blake v. Tucker, 12 Foster, N. H. 44; Funk v. Newcomer, 10 Md. 316; Barton v. Morris, 15 Ohio, 408; Bean v. Welsh, 17 Ala., 772; O'Banman v. Paramour, 24 Geo. 493; Mason v. Muncaster, 9 Wheat. 455.

circuity of actions, when better or equal justice may be administered in a single suit. By such a grant with general warranty, nothing passes, nor indeed can possibly pass, excepting the title which the grantor has at the time of the grant; but he is estopped to set up a title subsequently obtained by him, because if he should recover against his grantee, the grantee in his turn would be entitled to an action against the grantor, to recover the value of the land. The principle of estoppel, therefore, not only prevents multiplicity of suits, but is sure to administer strict and exact justice, whereas if the grantee were driven to his action to recover the value of the land, exact justice might not be obtained, because the land might possibly not be esteemed at its just value.

SEC. 268. If a grantor either expressly or by necessary implication, conveys an estate in fee simple, his heirs are estopped from denying that he had such an estate and passed it by the deed to the grantee.¹ If an executor convey an equitable interest in land before the issuing of a patent, and a patent subsequently issued in the name of the executor it enures to the benefit of the grantee by way of estoppel.² So although the church wardens of a parish are not capable of holding lands and a deed to them and their successors in office forever, cannot operate by way of grant, yet where it contains a covenant of general warranty, binding the grantors and their heirs forever, it may operate by way of estoppel to confirm to the church and its privies the perpetual and beneficial estate in the lands.³ An assignment of a patent before a patent is obtained is a good transfer of the right of the patentee when he obtains a patent, and he will be estopped from setting up any adverse title.⁴ Where a grantor conveys land, with warranty in which he has nothing at the time he is not only estopped from claiming in opposition to his deed, but the estate which subsequently vests in him is bound by the estoppel and is transferred by the

¹ *Van Rensselaer v. Kearny*, 11 Howard, 207; *Carbrey v. Willis*, 7 Allen, 364; *Gouchenor v. Mowry*, 33 Ill. 331.

² *Lents v. Baird*, 3 McLeau, 57; *Zants v. Courcelle*, 16 La. 96.

³ *Mason v. Muncaster*, 9 Wheat. 445.

⁴ *Herbert v. Adams*, 4 Mason, 15.

operation of the estoppel to the grantee. A fine levied by an heir binds his estate afterwards acquired by descent.¹ So where a testator was disseized and died, having by his will made two of his sons executors, with power to sell his lands. They did so as executors, and afterwards, together with the other heirs, brought ejectment against the purchaser on the ground that the testator having been disseized nothing passed by their deed. But the court held, that they were estopped to deny the effect of their deed, by claiming the land themselves.² A husband, entitled as such to an estate for life, conveyed the estate in trust for his wife, in order to avoid his creditors, covenanting against the claims of all persons claiming under him. He then went into insolvency, and his assignee sold the estate, on the ground that his former deed was void as against creditors, and the husband himself purchased it. But it was held, that he was estopped by his former deed to set up a title against his grantee. The defect in the title was like an encumbrance created by himself, against which he had covenanted, and by removing it, he had done no more than he had by his covenant, engaged to do.³ Where the estoppel of a conveyance binds the after acquired estate in the land conveyed, it extends beyond the immediate parties and enures in favor of all who derive title from the grantor by descent or purchase according to the measure of their respective interests, and subject to the provisions of the deeds under which they hold. A second grantee will therefore, ordinarily be entitled to the benefit of the estoppel, and enforce it against the original grantor, in the same manner as the first.

SEC. 269. Deeds defeasible by way of mortgage, are as much within the rule as if they were absolute, and the after acquired title enures to the benefit of the mortgagee.⁴ It extends beyond express warrantees to those arising by implication from the terms of the grant.⁵

¹ *Helps v. Hanford*, 2 B. and Ald. 242.

² *Poor v. Robinson*, 10 Mass. 136.

³ *Gibbs v. Thayer*, 6 Cush. 30.

⁴ *Annvet v. Annis*, 16 La. 227.

⁵ *De Wolf v. Hayden*, 24 Ill. 525.

SEC. 270. The principle is, that if any persons who in terms conveys land or any specific interest in land with warranty, and does not own it, afterwards acquires the same land or specific interest, such acquisition enures to the benefit of the grantee, because the grantor and those who are privy in estate with him, are estopped to deny against the terms of the warranty that he had the title in question. The warranty is co-extensive with the estate, right or interest which the deed purports to pass. Thus where A., when he executed a deed to B., had no title, but his deed was an attempt to convey the fee, and it was a deed with a warranty. This shows, first, that the intention was that the land, the whole interest in the land, should be conveyed to B.; secondly, that B. had paid the purchase money. Such being the intention, the consequence would be that if A. should afterwards acquire the title, he would be bound to convey it to B., as much so as if the contract were one standing in the form of a bond for title. This would be the consequence, even without the warranty, where the intention was clearly expressed in the deed, so as to place the existence of a fact beyond question, or make it a basis of the contract.¹ If an estoppel could not operate as a conveyance, or as a medium through which the title would pass to him, in whose favor the estoppel works, the title might frequently be locked up in him and his heirs, against whom the estoppel operated; and the party for whose benefit it was intended, might find himself without title, and unable to recover from a mere intruder; for if the title to the after acquired estate did not pass to the grantee by means of the estoppel, but it only precluded the grantor from asserting an after acquired title, it would be difficult to see how he could recover in ejectment from one who had no title; to show title in another would not enable him to recover, and he, having none, could not maintain the suit. To give, therefore, the full effect to an estoppel, it is clear that it must frequently operate to pass the title.²

¹ *Gordon v. Beacham*, 24 Georgia, 150.

² *Bean v. Welsh*, 17 Alabama, 773; *Derby v. Jones*, 27 Maine, 361; *Coe v. Persons unknown*, 43 Maine, 436; *Hall v. Chaffee*, 14 N. H., 326; *Wight v. Shaw*, 5 Cushing, 56; *Wyman v. Harmon's Devises*, 5 Grat-tan, 162; *Lewis v. Baird*, 3 M'Lean, 78; *Valle v. Clemens*, 18 Missouri, 490.

SEC. 271. Rawle, in his elaborate work on covenant for title, page 454, says, in regard to the creation of estoppel to warrantys, "if an estoppel is not created by a deed taking effect under the statute of uses, and if a warranty in that deed does not of itself create an estoppel, how is an estoppel created, and what is the true principle that appears to be properly deducible from the many authorities cited? The answer to this question might be, that the principle of the cases seems referable to a familiar rule in equity, that if a man contracts for the sale of an estate which he has not at the time such contract is entered into, and he afterwards acquires such an interest as will enable him to make good his contract, equity will compel him to perform it and make good the title, and that the presence of a warranty in a deed purporting to convey an estate, has, it would seem, upon strict principle, no greater effect than an averment that the contract between the vendor and purchaser is, that, that identical estate shall be actually transferred from the former to the latter; and such an effect can be produced by other covenants than that of warranty,¹ and by other parts of the deed than the covenants."² A grantor conveying by deed of bargain and sale, by way of release, or quit-claim of all his right and title to a tract of land, if made in good faith and without any fraudulent representations, is not responsible for the goodness of the title beyond the covenants in his deed.³ A deed of this character purports to convey, and is understood to convey, nothing more than the interest or estate of which the grantor is seized or possessed at the time, and does not operate to pass or bind an interest not then in existence. The bargain between the parties proceeds upon this view, and the consideration is regulated in conformity with it. If otherwise, and the vendee has contracted for a particular estate, or for an estate in fee, he must take the precaution to secure himself by the proper covenants of title. But this principle is applicable to a deed of bargain and sale by release or quit-claim, in the strict and

¹ *Wightman v. Reynolds*, 24 Mass. 680.

² *Rawle on Cov. for Title*.

³ *Van Rensselaer v. Kearney*, 11 Howard. 497.

proper sense of that species of conveyance. And, therefore, if the deed bears on its face evidence that the grantors intend to convey and the grantee expected to become invested with an estate of a particular description or quality, and that the bargain had proceeded upon that footing between the parties, then, although it may not contain any covenants of title, in the technical sense of the term, still the legal operation and effect of the instrument will be as binding upon the grantor and those claiming under him, in respect to the estate thus described, as if a formal covenant to that effect had been inserted, at least so far as to estop them from ever afterward denying that he was seized of the particular estate at the time of the conveyance.

SEC. 272. "Whatever may be the form or nature of the conveyance used to pass real property, if the grantor sets forth on the face of the instrument, by way of recital or averment, that he is seized and possessed of a particular estate in the premises, and which estate the deed purports to convey, or, what is the same thing, if the seizin or possession of a particular estate is affirmed in the deed, either in express terms or by necessary implication, the grantor and all persons in privity with him, shall be estopped from ever afterwards denying that he was so seized and possessed at the time he made the conveyance. The estoppel works upon the estate, and binds an after acquired title as between parties and privies. The reason is, that the estate thus affirmed to be in the party at the time of the conveyance must necessarily have influenced the grantee in making the purchase, and hence the grantor and those in privity with him, in good faith and fair dealing, should be forever thereafter precluded from gainsaying it. The doctrine is founded, when properly applied, upon the highest principles of morality, and recommends itself to the common sense and justice of every one; and although it debars the truth in the particular case, and therefore is not unfrequently characterized as odious and not to be favored, still it should be remembered that it debars only in the case where its utterance would convict the party of a previous falsehood, and im-

poses silence on a party only when in conscience and honesty he should not be allowed to speak.”¹

SEC. 273. The effect of the covenant is that the title acquired by the grantor who has conveyed with warranty, enures *eo instanti* that he gains the title, to his grantee and vests in him or to the grantee of such grantee with like covenants.² Many of the decisions have been based upon the ground of preventing circuitry of action. Thus it was held that an after acquired estate would pass, although the covenantor had since the conveyance been discharged, as a bankrupt. The breach of the covenant having happened after such discharge.³ Estoppels which run with the land and operate thereon, pass estates and constitute titles. They are muniments of title assuring it to the purchasers. So the heir of one who is entitled to bounty land, assigned his right after entry, he is estopped by his ancestor's deed from setting up any title under a patent issued in the name of his beneficiary.⁴ If a tenant for life convey in fee simple, and the fee is afterwards cast upon him, by operation of law, his heirs are estopped by his deed. An estoppel can only operate against a party who has conveyed a precise or definite legal estate or right, by a solemn assurance which he will not be permitted to deny or vary, but it has no operation to prevent the denial of an equitable transfer, not identical with the legal title, which it is relied on to establish or protect.⁵ Where one, as guardian, conveys lands and enters into covenants of warranty as to the title, in his deed, he is estopped from setting up a personal claim, to the same land under his own title.⁶

SEC. 274. The estoppel of a warranty being intended for the protection of the parties, should be so moulded as not to defeat the end which it was intended to secure; and when-

¹ Doe d. Merchant v. Errington, 8 Scott, 210; Bowman v. Taylor, 2 Ad. & Ellis, 278; Fairbanks v. Williamson, 7 Greenleaf, 96; Right v. Bucknell, 2 Barn. & Adolph, 281.

² Crocker v. Pierce, 31 Maine, 177.

³ Bush v. Cooper, 26 Miss 613; S. C. 18 Howard, 82.

⁴ French v. Spencer, 21 Howard, 228.

⁵ Gilmer v. Pointdexter, 10 Howard, 267.

⁶ Heard v. Hall, 16 Pick. 457.

ever there is no sufficient cause why the estoppel should not operate, it will be kept in abeyance.¹ The effect of the covenant will be limited in its extent by the premises granted, and with which it may run. As where a grantor owning one undivided sixth part of a tract of land, covenanted against the claims of all persons to the estate, he was only estopped as to his portion, and not to any shares which he afterwards acquired.² In order to bar a party by his covenant of warranty, the deed must not only be a good and valid one in form and mode of execution, but it must convey no title to the premises, nor pass anything upon which the warranty can operate ; for if it passes a title or interest, (that is, a vested interest,) the covenant does not operate as an estoppel even though it cannot operate upon the interest to the full extent of the parties. If any interest passes, however small it may be, it works no estoppel.³ The covenant need not be a general covenant of warranty, but will always work an estoppel to the extent of its terms. Thus where there was a covenant of warranty against a particular title which the grantor afterwards acquired, he was estopped to set it up.⁴ So where one covenants against incumbrances and afterwards buys in an outstanding mortgage or purchases the estate under a sale for foreclosure of a mortgage existing thereon prior to his conveyance, whatever title he thereby acquires enures to the benefit of his grantee.⁵ But the covenant to have this effect must be something more than the personal covenant of him who makes it. It must be of a nature to run with the land, and if it be such a covenant it will attach to the land and run with it the instant the covenantor acquires the title which he has undertaken to convey by his deed.⁶ Lord Coke, in treating of release, while commenting upon Little-

¹ *Pendleton v. Richey*, 32 Penn. 58 ; *Baxter v. Bradbury*, 20 Maine, 260 ; *Somes v. Skinner*, 3 Pick. Lessee of *Buckingham v. Hanna*, 2 Ohio State, 551.

² *Wight v. Shaw*, 5 Cush. 56 ; *Trull v. Eastman*, 3 Met. 121.

³ *Lewis v. Baird*, 3 McLean, 56 ; 4 Kent's Com. 98 ; *Jackson v. Hoffman*, 9 Cowen, 271 ; 2 Prest. Abst. 216.

⁴ *Blake v. Tucker*, 12 Vt. 39 ; *Trull v. Eastman*, 3 Met. 121 ; *Kimbal v. Blaisdell*, 5 N. H. 535.

⁵ *Brundred v. Walker*, 1 Beasley, 140.

⁶ *Patterson v. Pease*, 5 Ohio, 190 ; *Wheelock v. Henshaw*, 19 Pick. 341.

ton's statement, that "no right passeth by a release but the right which the releasor hath at the time of the release made," speaks of a release accompanied by a warranty, and remarks: "The warranty may rebut and bar him (the warrantor) and his heirs of a future right which was not in him at the time." He puts the case of a grandfather, father, and son, where the father disseizes the grandfather, and then makes a feoffment in fee, and the grandfather afterwards dies; the father, in such a case, might not enter upon his feoffee against his own feoffment, though the son might upon his death. It is said that there is no English authority that any other conveyance than a feoffment, fine, or lease, operates by way of estoppel to pass an after acquired title, "and so note a diversity between a release, a feoffment, and a warranty. A release, in that case, is void; a feoffment is good against the feoffer, but not against his heir; a warranty is good both against himself and his heirs."¹

SEC. 275. In some of the United States,² a similar rule exists with this difference: in England a release is secondary evidence, and derives its validity and effect from the possession of the releasee, while in this country it is primary evidence and passes the releasor's right the same as a grant, and in effect it operates as a conveyance without a warranty. If made with a warranty, the releasor is estopped to claim the land. A covenant for quiet enjoyment of the property by the grantees, estops the covenantor and those claiming under him, from interfering with such enjoyment;³ no title not *in esse* will pass by deed, unless the deed contains a covenant of warranty; in which case it operates as an estoppel as to such future title.⁴ No person can recover or defend himself against his own grant or covenant; nor can any one controvert against his own acts, though not by deed, a title which he has by his deed acknowledged.⁵

¹ Coke, Litt. 265, a.

² Dart v. Dart, 2 Conn. 256; Trull v. Eastman, 3 Met. 121; Butler v. Seward, 10 Allen, 468; Jackson v. Wright, 13 Johns. 193.

³ Long Island R. R. Co. v. Conklin, 29 N. Y. 572.

⁴ Blanchard v. Brooks, 12 Pick. 47; Dart v. Dart, 7 Conn. 250; Jackson v. Wright, 14 Johns. 193.

⁵ Cooper v. Galbraith, 3 W. C. R. R. 546.

SEC. 276. A state may be estopped by its own grant and warranty, like an individual, even from claiming land as having escheated, where the claim is made on the ground of alienage. Thus, where the commonwealth granted lands to an alien who died leaving heirs, citizens and residents of France; to an inquest of office for recovering the lands, it was held, that the deed and warranty of the commonwealth was a bar, and that it could not take advantage of the alienage of the heirs.¹

SEC. 277. A covenant of warranty is a perpetually operating covenant. When made in a deed by a grantor, has the same effect as if a particular recital or averment is inserted in his deed. Its effect as an estoppel is similar to that of a recital, upon this principle of conclusiveness: A grantor who has deliberately made certain representations and covenants of warranty in his deed, is not allowed to controvert the fact that he owned an interest in the estate which by his deed he granted, in order to set up a claim hostile or adverse to the title of his grantee, where his grant is of land or an estate, and not a quit-claim deed or a mere release of his interest or title to the same. A man is never allowed to claim in opposition to his deed, by averring that he had no estate in the premises. So where the plaintiff's ancestor conveyed the premises to the grantor of the tenant, the ground of the plaintiff's claim was, that when their ancestor conveyed the land, he had no title to it, but acquired one subsequently in his lifetime, which had descended to them. Tilghman, C. J., says: "Can his heirs recover against his grantees? In such case they would be estopped by their father's deed from denying his title, and if there were occasion for further assurance, equity would compel them to make it." "So in equity, a grantor conveying lands for which he has no title at the time, shall be considered trustee for the grantor, in case, at any time afterwards, he should acquire title." "Chancery would compel them (the plaintiffs) to convey to the defendants."²

SEC. 278. Where one conveys land with warranty, before

¹ Commonwealth v. Andre, 3 Pick. 224.

² McWilliams v. Nisely, 2 S. & R. 507.

he acquires title, he cannot bring ejectment upon his subsequently acquired title, against the grantee or his assigns.¹ It estops the grantor and his privies from any future claim of title, and passes an interest and a title the moment any estate in the land comes to the grantor.² The estoppel applies where the property is devised to the former grantor.³ A grantor in a deed conveying property in fraud of creditors is estopped, as well as his administrator, to avoid the deed.⁴ The estoppel includes the heirs of the grantor. A grantor in fee with covenants of warranty, can not deny that the heirs of the grantee are seized in fee. A title subsequently acquired by him enures to their benefit, unless, perhaps, with this exception: when an after acquired title is obtained through a judicial sale for taxes, or otherwise. This applies to a sale made by an administrator, even though the estate be held over in fact for a term of years only.⁵ Under the statute of Illinois, the words "grant, bargain, and sell," amount to an express warranty, and pass an after acquired estate.⁶ So a subsequent title enures under a covenant for further assurance in a quit-claim deed, as well as under a covenant of warranty,⁷ and where a grantor with full covenants of warranty against incumbrances, pays off or buys in a prior mortgage, or buys the land at a foreclosure sale under it, the right and title he thus acquires enures to the benefit of his warrantee.⁸ Lineal warranty estops the warrantor and his heirs from ever afterwards claiming title to the lands. To any such claim the warranty is a perfect defence or rebutter.⁹ But unless the deed contains covenants of general warranty, it cannot operate as an estoppel to pass an after acquired estate. The deed of an attorney estops him and all persons claiming

¹ *Lindsey v. Ramsey*, 22 Geo. 627.

² *Moore v. Rake*, 2 Dutch, 574; *Philly v. Sanders*, 11 Ohio S. 490.

³ *Washabaugh v. Entriken*, 34 Penn. 74.

⁴ *Beale v. Hall*, 22 Geo. 431.

⁵ *Jones v. King*, 25 Ill. 383.

⁶ *DeWolf v. Hayden*, 24 Ill. 525.

⁷ *Bennett v. Walker*, 23 Ill. 99.

⁸ *Brundred v. Walker*, 1 Beasley, 140.

⁹ *Smith v. Smith*, 14 Gray, 532; *Den v. Cornell*, 3 John. Cas. 174.

under him.¹ An alienation of the interest of one joint tenant, either by deed or other legal process, is not void for all purposes, but operates against him and all claiming under him by estoppel, whether he had notice or not, and can only be avoided by the co-tenant who is injured or those claiming under him.

SEC. 279. In England, while a contingent remainder will not pass by legal conveyance, yet it may pass by estoppel, but a *feme covert* not being bound by an estoppel, cannot convey such remainder,² by fine or recovery, so as to bind the party when the contingency happens, after the death of the original remainderman, and such remainder is assignable in equity.³ A fine by a contingent remainderman passes nothing but operates by estoppel, and has an ulterior operation when the contingency happens, the estate, which then becomes vested, feeds the estoppel and the fine operates upon it as though it had been vested when the fine was levied.⁴ A vested remainder, lying in grant, passes by deed without livery; but a contingent remainder is a mere right, and cannot be transferred before the contingency happens, otherwise than by way of estoppel, and therefore cannot be conveyed by a married woman. Any conveyance by matter of record or by deed indented, will work an estoppel. So if there be an estate to A. and B., and to the survivor in fee, a conveyance operating by way of an estoppel, will bind the contingent remainder in fee in the survivor. A lease and release, if the latter be by deed indented, will work an estoppel. The estate for life is only a tangible interest, and the other is a mere possibility, and estoppels exist where no interest passes from the party. One holding a vested interest and a contingent interest, conveying by deed with warranty his right, title and interest therein, passes his vested interest only by the deed, and is not estopped thereby to claim his contingent interest when it becomes vested.⁵

¹ Lee v. Getty, 26 Ill. 76.

² Den v. Demarest, 1 N. J.

³ 2 Cruise, 393; Doe v. Martyn, 8 Barn. & Cress. 516.

⁴ Doe v. Martin, 8 Barn. & C. 527.

⁵ Blackwell v. Brooks, 14 Pick. 47.

SEC. 280. Where an estoppel works on the interest of land, it passes with the land. An estoppel is not a mere conclusion, but may pass an interest and constitute a title from the moment the grantor acquires one, and all who come *in the post* are bound by the estoppel; though claiming under another title. The grantee's right is not limited to a claim by the grantor or his representatives; he may defend against trespassers or disseizors. Though a warranty estop the heir and his issue it does not estop the purchaser under a judgment against the heirs, recovered during the life of the ancestor and before the deed from which the estoppel would arise.¹ Where the husband conveys the wife's estate and afterwards inherits it from her, he is estopped.² So an heir and residuary devisee, who has given bond as such devisee, to pay the debts of his testator, is estopped to set up a subsequent title as heir of the testator's wife, against a warranty deed made by the testator, although all right of action on the covenants in the deed is barred by the statute of limitations.³ So where A. conveyed with warranty to B. land claimed by his father, and after the father's death purchased land of the heirs, one of whom was the wife of B. and released with her husband all her right, while B. could not claim against his own deed the share of his wife, all the residue enured to him by estoppel.⁴

SEC. 281. The rule that one having no title, but conveying with full covenants of warranty, and subsequently acquiring title, is estopped as against his grantee, to deny that he had a good title at the time of his grant, and that the new title enures to the grantee, applies in a suit upon the covenant for seizin, where the covenantee is in possession; but where the grantor purchases the paramount title after the eviction of his grantee, such title does not enure to the grantee by way of estoppel, without his consent, so as to defend his right to sue on the covenants of warranty, and to recover the consideration, neither can the grantor avail himself of it in miti-

¹ Jackson v. Bradford, 4 Wend. 619.

² Clark v. Slaughter 34 Miss. 65.

³ Cole v. Raymond, 4 Gray, 217.

⁴ Kimball v. Schoff, 140 N. H. 190.

gation of damages.¹ But if before the covenantor acquires a title, the covenantee sue for a breach of the covenant of seizin he cannot defeat that action by purchasing in the title and tendering it to his covenantee, if the latter refuse to accept it.² But if the title comes to the covenantor in the capacity of trustee, and not in his own right, it would not enure to the prior covenantee. The estoppel would not apply in such a case.³ The covenantee may estop himself from setting up the covenant of his grantor, by way of claiming the estate. If the purchaser under a deed with general covenants of warranty, be evicted by a better title, it is not in the grantor's power afterwards to acquire a title to the premises, and compel the grantee to accept the same against his will; but if instead of claiming the land, the purchaser sues upon his covenants, and recovers damages for a breach thereof, he is estopped thereby from claiming the land by estoppel, though his grantor and covenantor should have acquired.⁴ Nor will such covenant prevent the grantor from subsequently acquiring a title to the granted premises, and availing himself of it against his own grantee, if the title conveyed by such grant was, at the time a good one. Thus, where the grantor disseized his own grantee, and held adverse possession for twenty years, he was not estopped by his former deed and covenant, to claim title to the premises by such disseizin.⁵

SEC. 282. If a grantee after eviction by the holder of a paramount title, recovers damages for the breach of the covenants of seizin on the ground that the grantor had no title whatever, the operation of it must be to estop the grantee from setting up the deed afterwards as a conveyance of the land, against the grantor. The grantor may again enter if he chooses as against the grantee. A recovery in trespass or trover, vests the property in the party against whom the damages are assessed. And there is nothing in the nature

¹ *Burton v. Reed*, 20 Indiana, 87.

² *Tucker v. Clarke*, 2 Sandf. Ch. 96.

³ *Burchard v. Hubbard*, 11 Ohio, 316; *Kelly v. Jenness*, 50 Me. 455.

⁴ *Blanchard v. Ellis*, 1 Gray, 195; *Baxter v. Bradbury*, 20 Me. 260.

⁵ *Tilton v. Emery*, 17 N. H. 538; *Smith v. Montes*, 11 Tex. 24; *Stearns v. Henderson*, 9 Cush. 502.

of the feudal investiture, or in the principles which regulate the title to land that requires a different rule in relation to real estate.¹ The record of the recovery will furnish as good an estoppel as that which arises from a disclaimer,² when land conveyed by A. to B. with general warranty, and subsequently granted by B. to C. with warranty, but subject to incumbrances, was sold under a judgment against A., and bought in by him, it was held that the title thus acquired might pass to B. but that C. could claim nothing under it, who had taken subject to the first judgment on which execution was issued,³ where the deed does not, on its face, purport to convey an indefeasible estate, but only the "right, title and interest" of the grantor, even although the deed may contain a general covenant of warranty where that covenant is held to be limited and restrained by the estate conveyed and not to warrant a perfect title, the estoppel does not apply; while a warranty is invested with the highest functions of an estoppel in passing by mere operation of law; an after acquired estate, it loses that attribute when it is apparent that the grantor intended to convey no greater estate than he was possessed of. "Thus a devisee, being entitled to a vested remainder in one moiety, and a contingent remainder in another moiety of certain real estate held in common with other devisees, conveyed all his "right, title, and interest in and to the undivided real estate devised," with unlimited covenants of warranty and for quiet enjoyment, he was held to have conveyed only his vested interest, and the warranty being only co-extensive with the grant, he was not thereby estopped to claim the contingent interest when it became vested in interest and possession by the happening of the contingency.⁴

SEC. 283. Where a deed conveys title, a warranty can

¹ *Burton v. Reed*, 20 Ind. 87.

² *Parker v. Brown*, 15 N. H. 188; *Hamilton v. Elliot*, 4 N. H. 682; *Porter v. Hill*, 9 Mass. 36; *Stinson v. Sumner*. Id. 150; *Morris v. Phelps*, 5 Johns. 55; *Fitch v. Baldwin*, 17 Id. 164; *Blanchard v. Ellis*, 1 Gray, 202.

³ *Skinner v. Stainer*, 24 Penn. 125.

⁴ *Blanchard v. Brooks*, 12 Pickering, 66; *Wyman v. Harman*, 5 Gratt. 137; *White v. Brocaw*, 14 Ohio, St. 344

never operate as an estoppel.¹ A vendee holds adversely to his vendor, and is not estopped from denying his vendor's title.² There is no general or inflexible principle which estops the grantee from showing that the grantor had no title, or none which was capable of being passed by the grant. The mere acceptance of a conveyance does not prevent him from showing want of estate in the grantor of the land conveyed.³ By accepting a deed the grantee is estopped to deny the effect and provisions of such deed.⁴ A person is not allowed to accept a deed with covenants of seizin, and then set up breach of covenant on the ground that the grantee is himself seized at the time of the making of the deed.⁵ Where one who owns land adjacent to that of another, purchases of the latter a parcel bounded by his own, and the line is definitely described in the deed, he and his successors are estopped to claim that he was at the time of purchase, holding adversely any part of the land beyond the boundary line therein described.⁶ A grantor may dis-seize his grantee, and if he does, he is not estopped by his deed, from claiming title against his grantee, by adverse possession, as such disseizor to the land which he had formerly conveyed.⁷ The court of Massachusetts, while maintaining that if one grants his right, title, claim and demand to an estate with covenants of warranty against all persons claiming by or under him, the grantor is not estopped to set up a newly acquired title against his own grantor, and decide that a grantor of an estate is estopped by his conveyance to deny that he had any title in the land at the time of the conveyance, and whatever interest he had, passed to the grantee, by his deed.⁸ Where a person assents to an act, and derives and enjoys a title under it, it shall not lie in his mouth to impeach it.⁹

¹ *Lentz v. Baird*, 1 McLean, 51.

² *Cutter v. Waddingham*, 33 Mo. 143.

³ *Sparrow v. Kingman*, 1 N. Y. 242; *Averill v. Wilson*, 4 Barb. 180; *Blair v. Smith*, 16 Mo. 275.

⁴ *Shep. Touch.* 53; *Comstock v. Smith*, 13 Pick. 116.

⁵ *Fitch v. Baldwin*, 17 Johns. 161.

⁶ *Hodges v. Eddy*, 38 Vt. 349; *Root v. Crock*, 7 Penn. 378.

⁷ *Franklin v. Dorland*, 28 Cal. 180.

⁸ *Comstock v. Smith*, 13 Pick. 116.

⁹ *Rex v. Stacy*, 1 T. R. 4.

SEC. 284. Where in a deed, with covenants of warranty, there is a recital of an outstanding mortgage, the recital qualifies the covenant.¹ So where the grant is in the form of a release or quit-claim of all the grantor's right, title and interest, with covenants of warranty against all persons claiming by or under him, while such a grant as this estops the grantor from claiming that any title existed in him at the time of making his deed, it is no estoppel as to any after acquired title.² Where the covenant for seizin is satisfied by the transfer to the purchaser, of an actual though a tortious seizin, (as is the case in many of the New England states,) no estoppel is created by that covenant.³ Where the covenant of warranty is limited to the acts of the grantor, and the purchaser would not be entitled to sustain an action upon it, by reason of the defect of title not being of the grantor's own creation, and therefore not coming within the scope of the covenant, there will be no estoppel, and an after acquired estate will not pass to the purchaser. Judge Wilde in delivering the opinion of the court, said :⁴ " If the grantee were not entitled to recover the value of land on the grantor's covenant of warranty, then in such a case it is obvious that this species of estoppel would not be applicable. And such appears to be the law in regard to the covenant in question, by which the demandants attempt to estop the tenant to set up or plead the title of Waters. The tenant's covenant is a restricted covenant, and is co-extensive with the grant or release. He agrees to warrant the title granted or released and nothing more. That title only he undertook to assert and defend. To extend the covenant further would be to reject or do away with the restrictive words of it, and to enlarge it to a general covenant of warranty, against the manifest intention of both parties. The tenant,

¹ Jackson v. Hoffman, 9 Cowen, 271.

² Comstock v. Smith, 13 Pick. 116; Jackson v. Peck, 4 Wend. 300; Miller v. Ewing, 6 Cush. 36; Kinsman v. Loomis, 11 Ohio, 475; Harriman v. Gray, 49 Me. 538; Doane v. Willcutt, 5 Gray, 323.

³ Fox v. Widgeon, 4 Greenleaf, 218; Allen v. Sayward, 5 Id. 231; Doane v. Willcutt, 5 Gray, 333.

⁴ Comstock v. Smith, 13 Pick. 113; Bell v. Twilight, 26 N. H. 401; Tillotson v. Kennedy, 5 Alabama, 413; Chauvin v. Wagner, 19 Missouri, 653.

in covenanting to warrant and defend the granted or released premises, must be understood to refer to the estate or title sold or released, and not to the land, because he did not certainly intend to warrant any estate or title not intended to be conveyed. Now if Waters, after the the tenant's quitclaim deed, had evicted the demandants, this would have been no breach of the tenant's covenant. Or, if the tenant now held under Waters without having obtained the fee from him, he might pray Waters in aid, and thus defend himself against the title of the demandants, the title of Waters being, as the plea avers, the elder and better title, and this also, would be no breach of the tenant's covenant. He did not undertake to convey to demandants an indefeasible estate, but only his own title; nor did he agree to warrant and defend it against all claims and demands, but only against those derived from himself, by which he must be understood to refer to existing claims or incumbrances, and not to any title which he might afterwards acquire by purchase or otherwise from a stranger.¹ There is, therefore, no reason to be assigned why the tenant should not purchase the title of Waters. The demandants cannot thereby be prejudiced, nor ought they therefrom to derive any benefit. "It was then contended by the demandant's counsel, that, admitting the tenant is not estopped by his covenant of warranty, he is nevertheless estopped by his conveyance to deny that he had any title in the land at the time of the conveyance. This also is a well established principle of common law.² But the tenant, in this plea, does not deny that he had any title to the land; on the contrary he avers that before the time of his conveyance he was in possession of the land under Waters; that afterwards the demandants disseized Waters, and being seized by disseizin, they conveyed to the tenant all their right and title, with a covenant of warranty similar to the one contained in his conveyance to them. The demandants, in their turn, would be estopped to aver that they had no title in the land, nor is there any

¹ *Ellis v. Welch*, 6 Mass. 250.

² *Co. Litt.* 45, 47; *Jackson v. Murray*, 12 Johns. 201; *Jackson v. Bull*, 1 Johns. Cases, 91; *Isham v. Morrice*, Cro. Car. 110.

such averment in the pleadings. The tenant, at the time of his reconveyance, might have had a valuable interest in the land by possession and improvements, although Waters had a paramount title. This interest, whatever it was, passed to the demandants by the tenant's deed, and it was all the title he had to convey, or was expected to convey. If, under these circumstances, the demandants could now acquire, without any consideration, another title by estoppel, we should be compelled to admit that estoppels are as odious as they are sometimes said to be. But the doctrine of estoppel aids much in the administration of justice. It becomes odious only when misunderstood or misapplied. Nothing can be more just than the doctrine of estoppel urged by the demandants' counsel, when applied to a conveyance with a general covenant of warranty; but to apply the doctrine to the tenant's restricted conveyance and covenant, would be a manifest perversion of the principle upon which the doctrine is founded."

SEC. 285. A mere intention to convey will not be sufficient to pass a subsequent estate.¹ No particular form of words is essential to a conveyance to uses, but the deed, if it cannot operate in one way, may in another, to effectuate the manifest intention of the grantor. In the case of a conveyance, before the grantor has acquired the title, the legal estate is not transferred by the statute of uses, but the conveyances operate as an agreement, which the grantor is entitled to have executed in chancery.

SEC. 286. A covenant of warranty estops the grantor from setting up an after acquired title against the grantee, for it is a perpetually operating covenant; but he is not estopped by a covenant that he is seized in fee and has good right to convey,² for any seizure in fact, though by wrong, is sufficient to satisfy this covenant, its import being merely this, that he has the seisin in fact at the time of conveyance, and thereby is qualified to transfer the estate to the grantee.³

¹ Chew v. Barnett, 11 S. & R. 389.

² Allen v. Sayward, 5 Greenleaf, 227.

³ Chapell v. Bull, 17 Mass. 213; Marston v. Hobbs, 2 Mass. 433; Pearce v. Jackson, 4 Mass. 408; Twombly v. Henley, 4 Mass. 441.

A grantor, conveying by deed of bargain and sale, by way of release or quit-claim of all his right and title to a tract of land, made in good faith, and without any fraudulent representations, is not responsible for the goodness of the title beyond the covenants in his deed. A deed of this character purports to convey nothing more than the interest or estate of which the grantor is seized or possessed at the time; and does not operate to pass or to bind an interest not then in existence.¹ Neither is one who has purchased land in his own name for the benefit of another, which he has afterwards conveyed by deed to his employer, estopped by such deed from claiming the land by an elder and after acquired title. Nor is the heir estopped from questioning the validity of his ancestor's deed, as a fraud against an express statute.² But while a conveyance must necessarily fail of its object at law, unless the estate to be conveyed is vested in interest at the time when the deed is executed, it will, notwithstanding, be enforced in equity, as an executory agreement to convey, whenever the intention of the parties is apparent and sustained by a sufficient consideration.³

SEC. 287. An estoppel of a warranty may be restricted by its own terms, or by those of a deed in which it is inserted, and a deed without a warranty may operate as an estoppel, in order to prevent a failure of the purpose for which it was executed.⁴ Thus, a warranty against a particular outstanding title, will bind and pass that title by estoppel, if subsequently acquired, by the warrantor.⁵ So, where A., having only an equitable fee in land, mortgaged it by lease and release to B., covenanting that he was legally or equitably seized, and reciting that he was legally or equitably entitled to the premises, and the legal estate was afterwards conveyed to him, and by him was sold to C., he was not estopped to set up his after acquired legal estate, either by his covenant or his recital, they being in the alternative,

¹ Van Rensselaer v. Kearney, 11 Howard, 297.

² Doe v. Lloyd, 8 Scott, 93.

³ Goodson v. Beachan, 24 Geo. 180; Bayler v. Comforth, 40 Penn. St., 37.

⁴ Van Rensselaer v. Kearny, 11 Howard, 297.

⁵ Blake v. Tucker, 12 Vt. 39.

and not positive affirmations that it was a legal interest to which he was entitled, and that the words of release in his deed only operated to pass whatever interest he had in the premises at the time.¹ And where the grant was of all the grantor's right, title and interest in certain premises, with covenants that neither the grantor, nor any person claiming under him should claim, &c., there was held to be a qualified warranty of the land, and premises conveyed. The warranty was co-extensive with the estate which the deed purported to convey, but as that did not purport to convey any interest thereafter to be acquired, it did not affect any after acquired title.²

SEC. 288. Where a person gives a quit-claim without covenants, a title subsequently acquired by him, does not enure to the grantee.³ Hence a conveyance of all a man's right, title, and interest will not estop him from proving that he had no right to convey, and evicting the grantee by a subsequent acquired title,⁴ a conveyance by deed of bargain and sale or release without warranty or covenants, does not bind an after acquired estate then contingent.⁵ A party against whom a judgment is rendered in a real action, he having then an equitable title, is not thereby estopped if he afterwards acquires the legal title.⁶

SEC. 289. Where a grant in a deed is of all the grantors right, title, and interest in the land, and of the land itself, or any particular estate in the land; the warranty is of the premises, viz: of the estate granted, and must be confined to the estate vested. A conveyance of all the right, title, and interest in land is sufficient to pass the land itself, if the party conveying has an estate therein, at the time of the conveyance, but it passes no estate which is not then possessed by the party.⁷ The grant in legal effect operates only to

¹ *Right v. Bucknell*, 2 B. & Ad. 278.

² *34 Doane v. Wilcutt*, 5 Gray, 328; *Raymond v. Raymond*, 10 Cush. 134; *Gee v. Moore*, 14 Cal. 472.

³ *Hariman v. Gray*, 49 Me. 537.

⁴ *Miller v. Ewing*, 6 Cush. 34; *Right v. Bucknell* 3 B. and Ad. 278; *Frick v. Dorst*, 14 Ill. 314; *Kennedy v. Shear*, 3 Watts, 95.

⁵ *Lounsedale v. Portland*, 1 Oregon, 381, 399.

⁶ *Brown v. Roberts*, N. H. 131.

⁷ *Brown v. Jackson*, 3 Wheat. 152.

pass the vested interest, and the warranty being co-extensive with the grant, does not extend to the contingent interest, and does not operate on it by way of estoppel.¹ The estoppel of a warranty may be limited by the object of the deed and when that is simply to convey, or divide an estate which the parties have, it will not take effect on an after acquired title.²

SEC. 290. In cases of involuntary alienation, as where a creditor lives upon the land of his debtor, the latter is not estopped to assert a subsequent acquired title.³ If a disseizee take a deed from his disseizor he is not estopped to set up a former and better title.⁴ So where a grantee conveys all his right and interest in the granted premises he is not estopped to claim against his grantee under a newly acquired title though his deed contains a general covenant of warranty.⁵ A mere deed of grant with or without an indenture, does not in a court of law, work an estoppel. Whether operating as a grant, a release, or confirmation, if an heir apparent were to grant *his interest*, it would not have any effect at law, though he should afterwards become actually seized.⁶ The words "granted, bargained, sold and released," in a deed do not amount to an estoppel as to any future estate, nor do any of the deeds which take effect by the statute of uses.⁷ While a deed of acquittance or release may in certain cases be an estoppel, it being a valid and final bar to all existing claims and all the possibilities arising from previous contracts of which it imports a relinquishment, it cannot affect rights of which the foundation is subsequently laid.⁸ Thus where one who was entitled to a contingent remainder conveyed the same, and subsequently the estate became vested, if

¹ Miller v. Ewing, 6 Cush. 34; Blanchard v. Brooks, 12 Cush. 47.

² Doane v. Wileott, 5 Gray. 328.

³ Freeman v. Thayer, 29 Maine, 369; Tillotson v. Kennedy, 5 Ala. 413; Frick v. Darst, 14 Ill. 308.

⁴ Flagg v. Mann, 14 Pick. 467.

⁵ Hope v. Stone, 10 Minn. 132.

⁶ 2 Prest. Abs. 410; Clark v. Baker, 14 Cal. 612.

⁷ Burt Real Prop. § 593; Wms. Real Prop. 329; Brown v. Jackson, 3 Wheat 449; Kimball v. Blaisdell, 5 N. H. 535; Dart v. Dart, 7 Conn. 250; Clark v. Baker, 14 Cal. 612.

⁸ Co Litt. 265 a.; Burt Real Prop. § 149.

the conveyance was by quit-claim, the deed was no estoppel to his claiming the estate, if with covenants of warranty, it is an estoppel. In this case the contingency consisted in the grantor's taking as the oldest surviving son at the death of his father.¹ So a release of a disseizee to a disseizor, will effectually estop all of his claim to the estate.² A grant release, or bargain and sale, only operates as an estoppel between parties and privies, and does not bind or transfer future or contingent estates by estoppel. An estate acquired after the execution of a deed, will not pass by its operation merely as such, and no contingent or executory estate can be conveyed either by a common law grant, or under the provision of the statute of uses, and that not only does not pass by the estate, but it does not estop the grantor and those claiming under him from recovering the land at a subsequent period.³

SEC. 291. A deed estops the grantor from an equitable claim,⁴ or a claim of homestead.⁵ The rule of law forbidding champerty does not prevent an estoppel of the grantor himself.⁶ Where A. conveyed to B. land to which he had no title, but afterwards obtained a deed took actual possession, which he held adversely to all the world for seven years it was held that B's. right of entry was taken away.⁷

SEC. 292. A case similar to the instances heretofore cited of an after acquired estate passing by estoppel but not resting on the same technical ground is where one conveys an undefined interest in lands, to which at the time he has a general and undefined title, and subsequently acquires certain specified lands, in completion of his former right. The lands immediately vest in the assignee. Thus, where one

¹ Robertson v. Wilson, 38 N. H. 48.

² Perkins, § 86; 2 Prest. Conv. 269.

³ Pelletrau v. Jackson, 11 Wend. 110; Jackson v. Waidron, 13 Id. 178; Comstock v. Smith, 10 Mass. 116; Ham v. Ham, 11 Maine, 261; Kinsman v. Loomis, 11 Ohio, 475; Brown v. Jackson, 9 Wheat. 452; Bell v. Twilight, 27 N. H. 101; Sparrow v. Kingman, 1 N. Y. 242; Dodswell v. Buchanan, 3 Leigh, 365; Dart v. Dart, 7 Conn. 256; Robertson v. Wilson, 38 N. H. 48; Mattack v. Lee, 9 Ind. 298; Frick v. Dorst, 14 Ill. 304; Blanchard v. Brooks, 12 Pick. 47; Byler v. Commonwealth, 40 Penn. 37.

⁴ Breeding v. Stamper, 18 B. Mon. 175.

⁵ Foss v. Strachn, 42 N. H. 40; Williams v. Sweetland, 10 Iowa, 51.

⁶ Nance v. Thompson, 1 Sneed, 321.

⁷ Eddleman v. Carpenter, 7 Jones, 616.

having a contract for a grant of 8,000 acres of land from a state upon the completion of certain roads, to be laid off in any lands through which such roads might pass, before any survey or conveyance from the state; transferred an undivided third of this quantity of land, and afterwards took a deed from the state; both the grantor and all claiming under him were estopped from claiming such third part.¹ So where a joint proprietor of a township entitled to a certain number of acres, conveys his interest before any location is made to him, a subsequent location enures to the benefit of the grantee and vests a portion of the land in him in severalty.²

SEC. 293. Where tenants in common convey jointly with warranty land upon which one of them has a mortgage from the other, the tenant is estopped after making his joint warranty deed from claiming any interest in the land under the mortgage made to him by his co-tenant.³ So a surviving partner of a firm which had been engaged in gambling, and purchased and used a house for gambling purposes, cannot impeach the title of the grantee of the other partner, on the ground that the house is unlawfully used, being estopped by his privity with the grantor.⁴ Where an occupant of lands claims under a warranty deed from a third person, he is estopped to allege that he holds in common with the plaintiff.⁵ So one of two grantees who has accepted the deed by acting under it, in executing conveyances for parts of land, is estopped from denying the title of his co-tenant in common, and cannot claim the whole by a title paramount to that under which his co-tenant claims.⁶ A party cannot controvert the title of one under whom he claims.⁷ If either the pleading or evidence show that both parties trace their titles to the same source, neither can be permitted to attack the title of their common grantor. So where one has expressly

¹ Fairbanks v. Williamson, 7 Greenleaf, 96.

² Burghardt v. Turner, 12 Pick. 534.

³ Denham v. Allen, 2 Appl. 228.

⁴ Watson v. Fletcher, 7 Grattan, 1.

⁵ Siglar v. Van Ripar, 10 Wend. 414.

⁶ Funk v. Newcomer, 10 Md. 311.

⁷ Gilliam v. Bird, 8 Ired. 280; Crocker v. Pierce, 31 Me. 177.

recognized the title of another, and thus estopped himself from questioning its validity holding under him as vendee, must be held to a recognition of that title, and must show that he has acquired it.¹ A party cannot set up and at the same time deny the title under which he holds, as against his adversary having claim under the same title.²

SEC. 294. "A tax deed creates no estoppel upon the former owner for the reasons that it is not conclusive evidence of title. Its recital binds no one. It does not *ipso facto* transfer the title of the owner as in grants from the government or in deeds between man and man. The deed is not the title itself nor even evidence of it. No presumption arises upon the mere production of the deed that the facts upon which it is based have any existence; when it is shown, however, that the ministerial officers of the law have performed every duty which it imposed upon them—every condition essential in its character—then the deed becomes conclusive evidence of title in the grantee according to its extent and import. But the instant it is shown, if it is shown that the requirements of the law were not complied with, the tax deed is a nullity. Nor can any legislative body declare that it is conclusive. For the reason that a state legislative body cannot violate the obligations of contracts and divest the estate of the citizen. It cannot do indirectly that which it is forbidden to do by direct means, nor can it under the guise of taxation or the appropriation of private property to public purposes, take the land of A. and give it to B. Suppose A. is the owner and in possession of a tract of land worth two thousand dollars. It is sold at a tax sale," and "B. purchased it at fifty dollars; he procures his deed and brings an action of ejectment against A." A. relies upon one of three defences which ordinarily are conceded to be valid. 1st. That the land was not subject to taxation. 2. Or that it was never listed or valued and assessed. 3. Or that he paid the taxes before the sale. Can a legislature then step in and deprive him of his defence by

¹ Girault v. Zantz, 15 La. 684.

² Chonquette v. Barada, 33 Miss. 249.

declaring that a deed shall be conclusive upon all points? Certainly not, for no legislature or law making power possesses such arbitrary authority.

SEC. 295. The taxing power extends to the levy and collection of the tax. Taxable property is only embraced by it, and the power to collect cannot be extended so as to reach and divest the property of one who has paid his tax promptly. The law does not, and never intended that a party who had performed all his duties to the public, should be deprived of his property in this way; the power of taxation, so far as it relates to the collection of taxes, was designed to operate upon those only who should omit wilfully and negligently to pay these taxes to which they might be subject, and which should be legally assessed upon their estate, and not upon those who promptly perform all their constitutional obligation. The obligation is reciprocal, if the citizen performs his duty to the government. The government should perform its duties to the citizen.

Among the first of these, is protection to his property—not only from private force, cupidity or fraud, but from governmental plunder, and it cannot be taken by the state, or its agents, without any fault or omission on his part. If the land was not liable to taxation, if no taxes had ever been assessed upon it, or if the taxes had been paid, the power of sale never attached to it, and for any legislature to declare or any court to decide that the owner is estopped under a tax deed, from showing that fact, is not only unconstitutional, but would be a monstrous doctrine. So that notwithstanding legislative enactment the doctrine of estoppel cannot be applied to a tax deed.”¹ A party is bound by the record under which he claims title.² A county making a tax deed is one of the grantors, and is estopped by the recitals therein. Thus, where a Clerk of the Board of Supervisors without authority has issued a tax certificate, reciting that it was assigned by the county to J. C., and by him assigned to the defendant, the county is estopped from objecting to

¹ Blackwell on Tax Titles.

² Blackwell on Tax Titles, 600; East v. Wells, 2 Vt. B. 18; Kellogg v. McLaughlan, 8 Ohio, 113.

such assignment or the deed issued upon the certificate, and the (county) former owner of the certificate cannot avail itself of the original defect of authority. It estops itself by the issuing of the deed¹ where one of the parties claiming title to the land had made, in the capacity of collector, which office he formerly held, a tax deed of the land, under which the other party claims, and such tax deed is void by reason of stating a sale in lump, whereas the sale was in parcels. The party who made the deed is not estopped from setting up the defect in the deed.² But a tax deed cannot be impeached by a mere intruder.³ A legislature cannot make a tax deed conclusive evidence of matters which are vitally essential to any valid exercise of the taxing power.⁴

¹ Woodman v. Clapp, 21 Wis. 350.

² Byum v. Cook, 21 Iowa, 592.

³ Wheeler v. Winn, 53 Penn. St. 192.

⁴ Abbott v. Lindenhower, 42 Mo. 62.

CHAPTER XI.

LEASES BY ESTOPPEL.

SECTION 296. Leases become operative by way of estoppel where a lessor, at the time of making the lease, has no estate in the subject matter of the lease. In order that the estoppel can operate upon a lease of this kind, it must be by indenture, thus becoming the act of both parties, in order that the estoppel thereby created may be mutual.¹ Mutuality is a necessary ingredient of an estoppel. Thus, suppose A. makes a deed of indenture of lease of premises to which he has no title, and afterwards acquires one during the term; he will not be admitted to deny that his lessee had a good title to the same, nor, on the other hand, will the lessee, if permitted to occupy under such a lease, be at liberty to deny the title of his lessor.² For the want of mutuality, infants and *femes covert* are excluded from the benefit of a lease by estoppel where the lessor has no title at the time of the demise.³ The rule that the interest, when it accrues, feeds the estoppel, and that an after acquired estate enures to the benefit of the grantee, is peculiarly applicable, and in fact is one of the two modes under the old civil law, where an estate actually passed by estoppel. Such is now and ever has been the rule,⁴ but is wholly inapplicable where the lessor has any legal estate in the premises which passes by the lease, though than that which he has in terms demised.⁵ One reason for this rule, that in

¹ Burton Real Prop. § 850; Co. Lit. 352, a; 1 Platt Leases, 55.

² Burton Real Property, § 850; Smith Land and Tenant, 32; Co. Lit. 271; Sturgeon v. Wingfield, 15 M. & W. 224; Bank of Utica v. Mersereau, 3 Barb. Ch. 567; Wms. Real Prop. 329; Rawlyn's Cas. 4 Rep. 53; Bac. Abr. Lease, O.

³ 1 Platt Leases, 55.

⁴ Baxter v. Bradbury, 20 Me. 260; White v. Patten, 24 Pick. 324; Wms. Real Prop. 330.

⁵ Cuthbertson v. Irving, 4 Hurl. & Nor. 742.

order to ascertain what the amount of the estate is which actually passes by the lease, would open the very inquiry which it is the object and effect of an estoppel to preclude. It passes only what he has who makes it, while if it is wrongful, as by feoffment, fine, and the like, it operates to bar the estate which may afterwards be in the one making it.¹ The distinction should always be observed between the conveyance of a particular parcel of estate by description, and of the right or title that the grantor has in it.

SEC. 297. A man, by accepting a lease by indenture from a stranger, may bind himself to be treated as the lessor's tenant, and to pay him rent during the term purported to be granted by the lease, unless he has been induced by fraudulent representations to accept the lease.² Where one in possession of land, covenants with the owner to purchase it of him, but fails to, and the vendor brings ejectment for the land, the tenant is estopped by his covenant to set up an outstanding title against the claim of the plaintiff.³

SEC. 298. Estoppels apply to leases for years with greater force than to deeds poll. Thus, if a person execute an indenture, purporting to demise land for a term, in which he has no estate in fact, or no estate by a good legal title, and the want of such estate does not appear upon the instrument, the lease will operate upon any interest which he may afterwards acquire in the same land during the continuance of the term. It is requisite that it should be an indenture, in order to bind both parties, and make the estoppel reciprocal, while, if any valid interest, however short it may be of that pretended, actually passes from the lessor to the lessee; the lease works no estoppel against him.⁴ Coke cites this case: A., tenant for life of B., makes a lease for twenty years, then buys the reversion. B. then dies. A. may enter and avoid his lease by virtue of his newly acquired title. But had he

¹ 2 Prest. Abst. 411.

² 2 Prest. Abst. 210; *Alderson v. Miller*, 15 Gratt. 279.

³ *Jackson v. Ayers*, 1 Johns. 224; *Walker v. Sedgwick*, 8 Cal. 403.

⁴ *Shep. Touch. Prest.* 53; *Burt. Real Prop.* 550; *Wm.'s Real Prop.* 229; *Hermitage v. Tomkins*, 1 Ld. Raym. 729; *Jackson v. Bull*, 1 Johns. Cas. 90; *Co. Lit.* 476; 2 Prest. Abst. 410.

no title when he made the lease, and he then acquired one, he could not have contradicted his own lease, and say it was wholly void.¹ If the conveyance be rightful, as such, it derives its validity from the statute of uses. The circumstance that a lease for years, was anciently nothing more than a mere contract, explains a curious point of law, relating to the creation of leases for years, which does not hold with respect to the creation of any greater interest in land. If a man should, by indenture, lease lands, in which he has no legal interest, for a term of years, both lessor and lessee will be estopped during the term, or forbidden to deny the validity of the lease. This might have been expected. But the law goes further, and holds that if the lessor should, at any time, during the lease, acquire the lands he has so let, the lease which before operated only by estoppel, now takes effect out of the newly acquired estate of the lessor, and becomes for all purposes a regular estate for a term of years.²

SEC. 299. We have already seen, that no man is permitted to allege or prove anything in contradiction or contravention of his own deed. When, therefore, a man grants a lease under seal he is not permitted to avoid his own grant by proving that he had no interest in the demised premises, unless he is a trustee for the public, deriving his authority from some legislative enactment. As between him and his lessee the lease operates by way of estoppel. "And if one makes a lease for years, by indenture, of lands wherein he hath no title at the time such lease is made, and afterwards purchases the lands demised, it makes his lease as good and unavoidable as if he had been in the actual possession and seizin thereof at the time of making the lease ; because he, having by indenture expressly demised those lands, is, by his own acts, estopped, and concluded to say he did not demise them ; and if he cannot aver that he did not demise

¹ Co. Lit. 4, 47 B.

² Bacon's Abridgement Leases. 296 ; Rawlin's Case, 4 Coke ; Weale v. Lower Pollefoxen, 60 ; Smith v. Low, 1 Atkyns, 490 ; Trevivan v. Lawrence, 1 Salk. 226 ; Wells v. Austin, 7 Man. & G. 701 ; McKensie v. City of Lexington, 4 Dana, 129 ; Williams' Real Prop. 329.

them, then there is nothing to take off or impeach the validity of the indenture, which expressly affirms that he did demise them, and consequently the lessee may take advantage thereof whenever the lessor comes to such an estate in those lands as is capable to sustain and support that lease, and then the estoppel becomes good in point of interest, the heir of the lessor, and all persons claiming under the lessor by assignment or otherwise, are bound by the estoppel.

SEC. 300. If the lessor at the time of leasing has no vested interest in the land, but subsequently acquires such interest, it passes to the lessee or his assigns from the latter period by estoppel. This is peculiarly applicable where the lessor has a future or contingent interest as an heir apparent, or claims under a contingent remainder or executory devise; but not where any actual interest however small, passes by the lease. Adverse possession can not originate while the party actually occupies under a lease from the owner.¹ So a tenant under a lease from one having possession and control of the premises, but no title to them, which contains a clause that, in case the lessors should cease to control or own the property, (no rent should be paid, unless their successors should in writing confirm the lease,) by holding over and paying rent to the successive assignees of the owner, is estopped from denying that they are assignees of the original lessor, and continues bound to pay rent to them in that character or as having by the instruments of confirmation become new lessors.² So A. being a mortgagor in possession in 1848, demised to B. the defendant for seven years, and B. covenanted to repair in 1854. A. sold the equity of redemption to C., C. sued B. on the covenant. B. pleaded that A. did not assign to C. nor had he any reversion at the time of making the lease; nor did any reversion come to C. B. was estopped from denying that A. had such a legal estate as would warrant the lease and as no other legal estate would warrant the lease, and as no other legal estate or interest was shown to have been in A. it must be taken against B. by estoppel that A. had an

¹ *Corning v. Troy*, 34 Barb. 269.

² *Whalin v. White*, 25 N. Y. 362.

estate in fee.¹ Under a lease which contains an express covenant on the part of the lessee to pay the rent, he continues liable therefore during the whole term unless released by the lessor. The fact that he has assigned the lease and that the lessee has accepted rent from his assignee, will not relieve him from his obligation.² An express covenant by an assignee of a lease who receives possession of the premises before any portion of the rent becomes due, "to take such lease subject to the terms of the same, agreeing to pay rent at the times specified therein," binds him to pay rent for the entire term which by the lease was to become due after he took possession, and not merely the rent for the time that he might occupy the premises, and if the assignor is obliged to pay any part thereof he can recover it from the assignee. By the general principles of law, he takes it subject to all the equities to which the original party is subject, and must perform all covenants which are annexed to the estate and run with the land, without special agreement on his part to do so. The payment of rent being such a covenant, the assignee by accepting possession makes himself liable therefore though not named. A person, who accepts a lease, knowing that other parties are then in actual possession of the premises under an unexpired lease and after an ineffectual attempt to oust such parties, assigns his lease to them, he is estopped in an action for rent from setting up as a defense that he never was in possession;³ possession by his assignees is equivalent to possession in himself.

SEC. 301. When a question arises on the covenants contained in a lease, the peculiar estoppel which exists between landlord and tenant will preclude a denial of the title of the lessor not only as between the original parties, but when third persons are in question.⁴ And while the lessee remains in possession under the lease, he cannot set up any defense in the nature of a plea of *nil habuit in tenementis* against

¹ Cuthbertson v. Irving, 6 H. & N. 135.

² Martineau v. Steele, 14 Wis. 272.

³ Bailey v. Wells, 8 Wis. 141.

⁴ Palmer v. Ekins, 2 Ld. Raymond, 1550; Gouldsworth v. Knight, 11 M. & H. 237.

the lessor or those claiming under him by assignment, who have as much right to the benefit of the estoppel as if they were parties to the letting and not merely assigns. The estoppel of a lease grows out of an implied contract that the lessor shall be bound until actually or constructively evicted, as if the lessor had title whether he had it or not. On the faith of which the landlord gives and the tenant obtains possession of the land or estate by estoppel. After the acquisition of the estate by the landlord or lessor it becomes an estate in interest, and the parties and their assigns are in the same position as it had been *ab initio* an estate in interest. Where a lessee of land being also a tenant in common with others of the reversion, files a petition in partition, setting forth the title of the tenants as a present estate in fee, without noticing the lease, he is estopped from afterwards setting up his rights as lessee against a purchaser under the award in partition.¹

SEC. 302. A lease by indenture by a person having no estate whatever, as an heir apparent, by a party claiming under an executory devise, or contingent remainder, or by a person having a wrongful estate only in the premises, would operate by way of estoppel and conclusion against him on his obtaining a vested or rightful interest, whether by purchase or descent. A mortgagor is similarly circumstanced, and will be precluded by estoppel from claiming the land after redemption in opposition to his own lease. So, if one having no interest in the premises, by indenture make a lease for years to B., reserving a rent, and afterwards by indenture demise the same land to C. for forty years, C. has the rent by the same means by which he has the reversion, i. e., by estoppel. If a party lease lands in which he has no estate, and afterwards acquire an estate, the lease which before operated by estoppel only, becomes a lease in interest. It is, however, in all cases requisite that the premises forming the subject of demise be particularly specified or referred to; for a demise by A. of all his lands in Dale, not being at the time owner of any lands there, to

¹ Norton v. Autland, 18 Ohio State, 383.

B. for years, will fail, on account of its generality, to create an estoppel against him, on his subsequent acquisition of an estate in Dale.

SEC. 303. It is a rule that a lease shall not work by way of estoppel when it may pass an interest. One of the rules connected with this doctrine requires every estoppel to be reciprocal, and binding on both parties; hence, a stranger can neither take advantage of, nor be bound by, an estoppel. Infants also, and married women, on account of their legal disabilities, and persons contracting with them are exempt, for want of mutuality from the operation of the doctrine; and, accordingly, if one takes a lease by indenture of his own land from an infant or *feme covert*, he is not bound by estoppel from disputing the demise. The rule which requires reciprocity in cases of estoppel obviously involves the necessity for a lease by indenture; for, according to Littleton, Coke, and other authorities, if a lease be made by deed poll, the lessee is not estopped to say that the lessor had nothing at the time of the lease made; and the reason why a deed indented will, but a deed poll will not, conclude the taker, is, because the latter is the deed of the feoffor, donor, and lessor only, while the former is the deed of both parties, and concludes, therefore, the taker as well as the giver. Upon the same principle, it should seem, that, to enure by way of estoppel, the indenture must be executed by both lessor and lessee. An indenture, executed by the one and not by the other, being equivalent to a deed-poll; though, for this purpose, a lease executed by the lessor only, and a counterpart by the lessee, are considered as one indenture. If an interest (which it appears signifies a legal interest) passes, the lease cannot operate by way of estoppel; for one deed cannot so enure to two intents. Therefore, if a tenant *pur autre vie* leases for twenty-one years, and, after having purchased the fee, the *cestui que vie* dies, the lessor may avoid his lease; because an interest passed for the life of the *cestui que vie*. So, if A., tenant for life, and B., remainderman in fee, join in a lease, the lessee cannot, in the lifetime of A., recover in ejectment declaring upon the demise of both; for the lease during A.'s life is his demise, and must be so pleaded; nor

can the deed work an estoppel, on account of the interest that passed to the lessor. It enures by way of confirmation from the other, and not by way of estoppel. Tenants in common are considered as holding several freeholds, or other distinct interests, according to the quantity of their estate. Each tenant in common may grant his undivided share for any interest commensurate with his own, either to a stranger or to his companion, or two, or three, or all, of several tenants in common may concur in one lease, which will operate as a distinct demise of each tenant of his part and not as a joint demise of all. There is no estoppel in such a case, because an interest passes from each lessor.

SEC. 304. An indented deed works an estoppel, that is, "doth bar and conclude either party, his heirs, and all persons claiming under or through him, except heirs in tail, &c., to say or accept anything against anything contained in it." In case of a lease by indenture, "both parties are estopped to say the lessor had nothing in the land at the time of the lease made, so that, if the lessor happen to have the land thereafter by purchase or descent, the lessee may, during the term, enter upon him by way of conclusion." If the lease however, pass any interest it will not operate beyond that as an estoppel. On the other hand, a deed poll binds only feoffor, lessor, &c., and it would seem that a lessor by a deed poll would be as much bound on his part as if the instrument were an indenture.¹ But if one is induced by fraud to accept an indenture of land, he may, as tenant, deny that the other party has any title.² But, if a man take a lease for years, by indenture, of his own land, he would, during the term, be estopped to deny the lessor's title, the estoppel continues during the term, and determines with the lease.³ And whether the deed be indented or poll in form, if it con-

¹ Shep. Touch. 53; *Hermitage v. Tompkins*, 1 Ld. Raym. 729; 2 Prest. Abst. 210; Bae. Abr. Leases, O.; Com. Dig. Estoppel, E. 8; *Jackson v. Murray*, 12 Johns. 204; Co. Lit. 476; *Webb v. Austin*, 7 M. & G. 724; *Beanpland v. McKeen*, 28 Penn. St. 132; *Cuthbertson v. Irving*, 4 H. & N. 742.

² *Alderson v. Miller*, 15 Gratt. 279; *Jackson v. Ayers*, 14 Johns. 224.

³ *Rawlins' case*, 4 Rep. 54; *Doe v. Seaton*, 2 Crompt. M. & R. 730; *Doe v. Barton*, 11 A. & E. 307.

tains reciprocal obligations from one to another and it is executed by both, it is binding on both parties.¹

SEC. 305. An estoppel is not wholly confined to the parties to the lease, but, being annexed to the estate, runs with the land, and is binding alike on all persons claiming under them. The heir of the reversioner, being privy in blood, and taking the estate subject to the burthens under which his ancestor enjoyed it, is bound by the estoppel, where that ancestor, having no estate in the premises, or only a contingent remainder, made a lease by indenture, and afterwards purchased the fee of the land demised, and died. The heir, however, will not be bound, unless he claim the land from him who created the estoppel; and, therefore, if the heir purchase the reversion himself, or if it devolve upon him by descent from another ancestor, he will not be bound.² Nor will he be bound, unless the estoppel would have operated upon the inheritance in the hands of his ancestor; and, consequently if tenant for life, lease for years, and afterwards purchase the reversion in fee, and die within the term, his heir may enter; for, a freehold being a greater estate than any term of years, the decease of the tenant for life, out of whose estate the lessee's interest arose, is the regular period appointed by law for the determination of the lease. Privies in estate are also bound. Thus, if A. makes a lease by indenture of D., to which he has no title, and afterwards, becoming its owner in fee, dispose of it to B., the latter will be estopped from disputing the lease. So, if a mortgagor grant a lease, and after performance of the condition in the mortgage make a feoffment in fee, the feoffee will hold subject to the estoppel.³ So, the lessor's assignees may take advantage of estoppels, even though he become bankrupt. Privies in law, as the lord by escheat, tenant by the curtesy, tenant in dower, and others who come under by act in law, or in the *post*, are also bound by, and competent to take advantage of estoppels. But if one joint tenant of land take a lease of the same land, by indenture of a stranger, and die, the survi-

¹ Shep. Touch. 53.

² Com. Dig. 275, Estoppel c., Good title dem.; Faulkner v. Morse, 3 Term.

³ Edward v. Meilhallum, March, 64; Rawlyns case, 4 Coke. 53.

vor is not bound by the conclusion; because he claims above, and not under it. On the other hand, the lessee, by executing the lease, and parties claiming under him, are also estopped from impeaching or disputing his landlord's title; and the rule is founded in good sense, policy, and justice; for if it were otherwise, the tenant might enjoy the property demised, and afterwards defeat the lessor of his remedy for rent. Thus, he cannot plead that there was no demise. So, if an underlease, executed by the underlessee, contain a covenant by him to pay the rent reserved by the original indenture of the lease; or if the original lease be recited in the underlease; in either case the court will estop him from denying the existence of such lease. In like manner, the assignee of a lease is concluded by the deed which estops his assignor.

SEC. 306. An estoppel by indenture will not bar the lessee beyond the duration of the interest derived by him under the lease. Thus, if a man take a lease for years, by deed indented of his own land, it is no estoppel beyond the term, at the end of which the lessor may enter and occupy the land, for by the termination of the term the estoppel is also determined. But if a party take an interest in his own land from a stranger by matter of record, and not a mere indenture, the fee will be bound and the taker estopped forever.

SEC. 307. Whether an assignment be absolute or conditional if the assignee enters under it and occupies the estate, he can neither deny the validity of the assignment in an action by the lessor for rent, nor can he escape liability for the same, by abandoning the premises before the expiration of the lease.¹ Privies are entitled to the benefit of an estoppel as well as parties, and an assignment by a lessor creates a sufficient privity in the assignee to entitle the latter to claim the benefit of the implied admission of the tenant, that the landlord has sufficient estate to make the lease, however defective his title may be for other purposes. A lessee by deed

¹ Blake v. Sanderson, 1 Gray, 332; Carter v. Hammett, 18 Barb. 608; S. C. 12 Barb. 252; Dorrance v. Jones, 27 Ala. 630.

indented was held to be estopped from denying the title of the assignee, though the effect appeared on the face of the assignment and was admitted by the case stated.¹ The decision shows that a reversion may arise by estoppel, even when the pleadings disclose that it does not exist in fact, and is founded solely on the contract of letting. The court said if the want of title had appeared in the lease, it might have been taken advantage of by the defendant. It is difficult to believe that the landlord can be placed in a worse position by setting the whole matter fairly before the tenant in the instrument by which the land is demised. If a tenant chooses to enter into an absolute engagement to pay rent, in full knowledge of all circumstances, he is estopped by his agreements from claiming to be released while they remain unchanged. The material question in such cases, is not whether the landlord's title is good, but whether the tenant has sustained any injury by reason of its being bad, because if he has not, and still retains possession of the land, the lease should not only be binding between the parties, but in favor of a subsequent purchaser from the lessor. "So long, said Baron Martin, in *Cuthbertson v. Irving*,"¹ as a lessee enjoys everything which his lease purports to grant, how does it concern him what the title of the lessor or of the heir, or of the assignee of the lessor really is.¹ All that is required of him, is that having received the full consideration of the contract, he should perform it.¹ And this is equally true when the lack of title appears on the face of the lease, and how that fact can change the matter or exonerate the tenant is a matter that it is difficult to understand. Estoppels do not arise to shut out the truth: but because if the truth was shown it would not effect the justice of the cause.²

SEC. 308. The words "grant and demise," in an indenture of lease, are equivalent to covenants of warranty and of quiet enjoyment.³ If the lessor only, seals, and not the lessee, yet it is as good as if both had sealed. This works an estoppel, that is, it does bar and conclude either party to say

¹ *Cuthbertson v. Irving*, 4 Hurlst. & N. 742; 6 Id. 135.

² *Jackson v. Waldron*, 13 Wend. 128.

³ *Barney v. Keith*, 4 Wend. 50.

or except anything against anything contained in it.¹ A lease which one executes as agent of the lessor estops him from setting up any claim to the land inconsistent with the lease,² and the lessee, where no principal is disclosed, cannot controvert the lessor's title.³ Where a party voluntarily enters into a contract for a lease of real estate, goes into possession under it and peaceably occupies the premises according to its terms, on the plainest principles of justice he is estopped from disputing its validity.⁴ In a lease for life, a recital that the lessee is in possession at the time of its execution, estops the lessor from denying that such was the case, thus rendering the instrument valid as a release, while it would have failed otherwise from the want of livery of seizin,⁵ all parties claiming under deeds of lease and release are estopped by the recital of the lease, from denying the existence of the former, or that possession under it is necessary to give the latter its intended operation. If a lease contains a covenant or recital that the legal title is outstanding, but that the lessee agrees not to take advantage of the defect, and is to be liable in all respects as if the lessor were seized of an estate in fee, it is binding on both parties and estops the tenant from pleading *nil habuit in tenementis* to an action brought by the lessor.⁶

SEC. 309. If the recital of a lease in a deed of release is admitted to be good evidence of the execution of the lease, it must be good evidence of the very lease stated in the recital, and of the contents, so far as they are stated therein, for they constitute its identity.⁷ If the lessor in ejectment has released his interest to the defendant, the plaintiff, by such release, is estopped from claiming any title.⁸ When the estoppel is founded on a grant or contract, it will not

¹ Shep. Touch. § 53.

² Blanchard v. Tyler, 12 Mich. 339.

³ Bedford v. Kelly, 61 Penn. 491.

⁴ Grant v. White, 42 Mo.; Whalen v. White, 25 N. Y. 462; Bailey v. Krebbin, 10 Met. 176; Hodges v. Shields, 18 B. Mon. 828.

⁵ Rees v. Lloyd, Wight, 129.

⁶ Carver v. Astor, 4 Pet. 1; Crane v. Morris, 6 Pet. 598.

⁷ Crane v. Morris, 6 Peters, 622.

⁸ Jackson v. Forster, 12 John. 488.

endure after the instrument has ceased to operate, or when the purpose for which it has been executed has been attained. A lease by deed indented will not estop the lessee from denying the landlord's title, after the expiration of the term. But when possession is obtained by the lessee ~~on~~ in faith of the lease, it will give rise to an estoppel of a different nature, that will endure until the lessor is replaced in his original position,¹ while a lessee may rely upon a want of mutuality as a reason why he should not be bound by a lease of his own land from a *feme covert* to which he has put his seal; if his possession was derived from her he must surrender it to her before he can set up an adverse title or deny hers.² It is a universal and well settled rule that a man cannot blow hot and cold in the same proceeding, by denying anything which he has required his antagonist to submit to; under such circumstances, the rule that an estoppel must be mutual is inflexible, and admits of no exception.

SEC. 310. The application of estoppels to all obligations, *ex contractu*, is that they must be mutual, that neither party will be bound unless the estoppel extends to both. Where the tenant is estopped to deny the landlord's title, the landlord cannot allege that he had nothing in the land at the time of the demise as a reason why he should not recover, notwithstanding an assignment of the reversion, while when the lessee is at liberty to plead *nihil habuit in tenementis*, the lessor will be equally free.³ If a man take a lease of his own land by indenture, from a *feme covert* the married woman not being estopped by reason of her disability, the lessee will be equally at large.⁴ The rule, that the estoppel must be mutual, does not apply in general to unilateral instruments, to which one party only sets his seal, for the reason that the estoppel cannot be broader than the deed and a grantor may be estopped although there is no estoppel on the grantee. A lease by deed poll or even by indenture, and purporting to

¹ Sparrow v. Kingman, 1 N. Y. 242.

² James v. Langdon, Croke Eliz. 37.

³ Green v. James, 6 M. & W. 656; Pargetter v. Harris, 7 Q. B. 708.

⁴ Dempsey v. Tylee, 3 Duer, 73; Coke Lit. 552

bind both parties if sealed only by the lessor, did not estop the lessee from denying the lessor's title at common law.¹ Although the lessor will be as much bound by the solemnity of his own deed as if it had been executed by the lessee.² The grantee or lessee in a deed poll is not in general estopped from gainsaying anything mentioned in the deed; for it is the deed of the lessor or grantor only; yet if such grantor or lessee claims title under the deed, he is thereby estopped to deny the title of the grantor or lessor, but he is not always estopped by the recitals in anterior title deeds.

SEC. 311. Estoppels under the earlier practice did not meet with much favor from the authorities, as they tended to shut out the truth and were deemed odious, and if by any construction they could be avoided they were excluded. There is no estoppel where an interest passes by the lease, though the interest the lessor purports to grant is really greater than he has at the time of making the lease the power to grant. Thus, where a lessor for the life of B. makes a lease for years and then purchases the reversion in fee, after which the *cestui que vie* dies, the lessor may avoid his lease, though several of the years expressed in the lease are still to come, for he may confess and avoid the lease which took effect in point of interest, and determined on the death of "B."³ So if two join in a lease, and only one has any interest in the premises, it enures by way of confirmation from the other and not by way of estoppel.⁴

SEC. 312. An estoppel cannot operate after the estate of the lessor is determined; for it begins by, and, therefore, terminates with the lease.⁵ But where a lease for years cannot take effect immediately, by reason of a prior lease of the same premises, the second lease operates by estoppel, for so much of the term as may be left after the determination of the former, by way of passing an interest.⁶ But if it appears from recitals in a lease, that he had nothing at

¹ Co. Litt. 47.

² Bac. Abdg. Tit. Lease.

³ Leceister v. Rehoboth, 4 Mass. 180, Co. Lit. 47, b.

⁴ Brereton v. Evans, Cro. Eliz. 700.

⁵ Neave v. Mose, 1 Bing. 360; 7 Ad. & El. 157; 2 Nev. & Per. 123.

⁶ Skipwith v. Green, 1 Stra. 610; 3 Danv. 272; 8 Mod. R. 11.

the time of the demise, and he afterwards purchases the land, it does not enure to the lessee by estoppel. He is, however, estopped from contending that he had merely an equitable estate when he granted the lease. The lessee is not estopped, by a description of the land in a lease, from showing that what was there called meadow was not, in point of fact, such.¹ An assignee, also, is estopped by the deed which estops his assignor;² and by executing an assignment, in which the original lease is recited, he is precluded, in an action by the assignor, from calling upon him to prove the lease.³ But although a lessee may maintain an action of covenant against his lessor on a lease by estoppel,⁴ the same privilege does not extend to his assignee.⁵ All estoppel, however, must be reciprocal and mutual, for, as the whole estate is created by estoppel, both parties must be bound or neither.

SEC. 313. The rule requiring reciprocity in cases of estoppel, necessarily requires that the lease shall be by indenture and not by deed poll; for both the lessor and lessee must be bound, or neither. A stranger can neither be bound by or take advantage of an estoppel, it being confined to privies in blood or estate. Possession will follow ownership, unless there is an adverse possession. At common law, no interest in land could pass from a vendor before he had himself obtained livery of seizin; but, by force of the statute of uses, the possession was transferred to the *cestui qui use*, who may now, therefore, in case there is no adverse possession, make a lease for years, without actual entry;⁶ and, as a general rule, if there is a reversion in the lessor at the time of making the lease, it will be a good charge upon the reversion, and take effect in interest and possession if the reversion happens to be reduced into possession during the period limited by the contract for the enjoyment of the land, the lessor being estopped, by his

¹ Taylor v. Needham, 2 Taunt. 278.

² Nash v. Turner, 1 Esp. 217.

³ Style v. Hearing, Cro. Jac. 73.

⁴ Ander v. Noaks, Cro. Eliz. 373-436.

⁵ 4 Co. 54, a.

⁶ Bellingham v. Alsop, Cro. Jac. 52 and 408; Cro. Eliz. 216.

own deed, from saying that he did not demise the premises.¹ Where a covenant runs with land, the mere occupation of it for a particular purpose is in subordination to, and affected by, such covenant; and though the occupant may not be bound to perform it, yet it will operate as an estoppel against him in all cases in which the landlord would be estopped by it.²

SEC. 314. A tenant is estopped to deny the seizin of the husband's death, if the title is derived from his heir. Where the tenant held a deed from two grantors, one of whom died and his widow brought dower, it was held that the tenant could not show by parol that the interest and estate of the deceased grantor in the premises granted, was less than one half, in order to reduce the share out of which she might claim her dower.³ An heir is estopped to deny the seizin of his father of lands which descended to him, to a claim of his mother for dower therein.⁴ Where a tenant claimed under the heir of the husband, it was held that he could not deny the death or seizin of the husband, in an action by his widow to recover her dower.⁵ Where the widow, as executrix of her husband's will, conveyed the estate to the tenant, subject to her right of dower, it was held that he was estopped to deny the husband's seizin.⁶ And where she proved a deed of the estate to her husband, and one with warranty from him, followed by a deed from his grantee to the tenant, it was held sufficient to establish the husband's seizin.⁷ Where the husband entered upon a parol of land other than that described in his deed, by mistake, and died, and his administrator sold it as his, and the original vendor, in order to make a good title in the purchaser, released to him, the tenant was not at liberty to deny the husband's seizin against a

¹ Nutford v. Fennick, And. 288; Cro. Jac. 168.

² Duffy v. N. Y. & N. H. R.R. Co. 2 Hilton, 496.

³ Stimson v. Thomaston Bank, 28 Me. 259.

⁴ Griffith v. Griffith, 5 Harring. 5.

⁵ Hitchcock v. Carpenter, 9 Johns. 344; Hitchcock v. Harrington, 6 John. 290; Montgomery v. Bruere, 1 South, 260.

⁶ Smith v. Ingalls, 13 Me. 284.

⁷ Thorndike v. Spear, 13 Me. 91; Davis v. Millett, 34 Me. 429.

claim to dower in behalf of his widow.¹ It is sufficient for her to establish her husband's seizin, to show he was in possession of the premises, and made a deed of warranty of the same, and that the tenant claimed under him.²

SEC. 315. A tenant at will, for years, or for life, if he make a feoffment, the feoffee cannot set up a want of seizin on the part of the feoffor, in an action brought by his wife to recover her dower.³ Nor is he permitted to show that such seizin was only colorable, and designed to defraud the creditors of him from whom the husband derived his seizin. Where the husband, being seized of a remainder expectant upon a life estate, mortgages the land in fee and dies, and his wife claims dower against the mortgagee, he cannot set up a want of seizin in the husband against her claim.⁴ Where the tenant holds under the husband, he is estopped from denying the husband's seizin.⁵ Thus, where the only title of the tenant is a deed of warranty from the husband, he is not permitted to show that the husband, in fact, has no title to a part of the premises. As the husband's deed is his only title, "he is, therefore, estopped from denying his grantor's seizin."⁶ Thus, A. conveyed to B. by deed of warranty, and, upon the death of B., his widow, relying upon that deed as evidence of her husband's seizin, had dower set out to her, and afterwards A.'s wife brought her action of dower against B.'s wife and the tenants claiming under her. B.'s wife is estopped to deny A.'s seizin.⁷ The vendee of the husband is not estopped,⁸ in an action to recover dower, from showing affirmatively a want of seizin in the husband. While a tenant who held under the hus-

¹ *Hale v. Munn*, 4 Gray, 132.

² *Bolster v. Cushman*, 34 Me. 428; *Bancroft v. White*, 1 Caines, 185; *Embree v. Ellis*, 2 Johns. 119; *Ward v. Fuller*, 15 Pick. 185; *Haines v. Garden*, 10 Maine. 383; *English v. Wright*, 1 Cox, 437; *Thompson v. Thompson*, 19 Maine, 239; *Osterhout v. Shoemaker*, 3 Hill, 519.

³ *Kimball v. Kimball*, 2 Greenl. 226.

⁴ *Mason v. Allen*, 6 Greenl. 243.

⁵ *Pledger v. Ellerbe*, 6 Rich. 266.

⁶ *Wedge v. Moore*, 6 Cush. 8; *Gayle v. Price*, 5 Rich. 525.

⁷ *May v. Tillman*, 1 Mich. 262.

⁸ *Crittenden v. Woodruff*, 6 Eng. 82.

band was not permitted, in an action brought by his grantor's widow, to deny the seizin of the husband, yet he was permitted to deny that it was such a seizin as gave his widow a right of dower.¹ Where the husband conveys during coverture, his grantee cannot deny his seizin.²

SEC. 316. A widow is often barred from claiming dower by acts which operate by way of estoppel. Such acts, in order to have this effect upon the rights of a *feme covert*, must constructively amount to one of the modes known to the law as constituting such bar, as her right of dower is neither derived from, nor dependent on any contract, nor is she barred by any acts or declarations upon which others may have been induced to act, although in matter of contracts under similar circumstances she would not be allowed, where it would work fraud and injustice, to allege against the truth of her acts or declarations.³ The application of estoppels to bar the right of dower are generally founded on circumstances arising from some action on the part of the widow in the sale of the estate after the death of the husband. There must be some unequivocal act or declaration on her part which would either render a claim of dower on her part clearly unjust, or subject her to damages equal to its value, if claimed, where the court, to avoid circuitry of action, applies the estoppel. Thus where a widow was entitled to dower out of an equitable estate of her husband, which was sold by his administrator by order of court, at which sale she was present and stated that the estate was free from any claim of dower; she was thereby estopped from claiming it against the purchaser, who had bought the premises relying upon her statement, although it was merely by parol.⁴ Thus where the widow, as administratrix of her husband's estate, sold lands under license of court, and orally declared they were free of dower, and the purchaser went on and made improvements upon them, she was estopped.⁵ Where the

¹ Gammon v. Freeman, 31 Me. 243.

² Thompson v. Boyd, 2 N. T. 543.

³ Martin v. Martin, 22 Ala. 104.

⁴ Smiley v. Wright, 2 Ohio, 511.

⁵ Dongrey v. Topping, 4 Paige, Ch. 94.

heirs sold the inheritance by an arrangement with the widow that she should receive her share of the purchase money, which was accordingly paid to her and she gave a receipt for the same, but signed no deed of release, she was estopped from claiming her dower.¹ Where as administratrix a widow sold her husband's land by order of the court, and in her deed covenanted to warrant the title, to avoid circuity of action, she therefore barred herself of dower.² And where the widow as administratrix sold her husband's estate and then married the purchaser, and he sold the estate by a warranty deed, in which she joined, relinquishing her right of dower in the premises, she was barred as to her rights under either husband.³ A widow may be estopped from claiming dower by the covenants of her ancestor from whom she has received assets. Thus, the land of A. was sold on execution, and bought by B., who conveyed it with covenants of warranty. A.'s wife was heir at law to B., and on his death received assets by descent. A. and B. having both died, she sued for dower as widow of A., but the court held that she could not claim it against the covenants of B., since what she recovered as dower she would have to respond for as heir.⁴

SEC. 317. The acceptance of a grant is a conclusive admission of the right of the grantor to convey, and therefore when the defendant in an action of dower claims under the husband, he is estopped from denying his seizin against the widow.⁵ Thus, where two grantors conveyed land by deed of warranty, without any designation of the manner in which it was held by them, one died, and his widow brought her action of dower, claiming to be endowed of one-half of the premises; the grantee was estopped by his deed from showing that the living grantor was seized in severalty of a much greater portion, and the deceased of a much

¹ *Simpson's Appeal*, 8 Penn. St. 199; *Ellis v. Diddy*, 1 Smith. 354; S. C. 1 Ind. 561.

² *Magee v. Mellon*, 23 Miss. 585.

³ *Usher v. Richardson*, 29 Me. 415.

⁴ *Torrey v. Minor*, 1 S. & M. Ch. 489; *Bates v. Norcross*, 14 Pick. 224.

⁵ *May v. Tillman*, 1 Mass. 262; *Gayle v. Price*, 5 Rich. 525; *Wedge v. Moore*, 6 Cush. 8; *Ward v. McIntosh*, 12 Ohio State. 231.

less proportion than an undivided moiety.¹ In a suit for dower against one who entered under a deed from the husband's grantee, the defendant has been held estopped to deny the husband's title, or to aver that, after the purchase of the land, an action being brought against him by the true owner, he bought a true and permanent title.² So, one is estopped who holds under a deed from the widow, as executrix of the husband, conveying the land subject to dower.³ So, where the husband was in possession, and an execution levied upon the land, under which the tenant claims title; this is sufficient proof of seizin in the husband.⁴ Where, to a suit for dower, the defence is set up that the defendant was not seized, and the plaintiff prevails; this judgment is conclusive in her favor upon a subsequent bill in equity for mesne profits.⁵ Acceptance of dower estops a widow from disputing her husband's title.⁶ Where the widow remains in possession of the lands, she is estopped to deny the husband's title, even though she surrenders to one claiming under an execution prior to the husband's deed, and then resumes possession under him.⁷ In an action of dower, the husband's seizin is established by proof of a deed to him; if a deed from him with covenants of general warranty; and of a similar deed from his grantee to the tenant, though his deed was executed soon after a judgment in his favor upon a writ of entry on his own seizin, and before he had paid to the tenant in that action the amount assessed by the jury for betterments; provided the value of the betterments was actually within the time prescribed by statute. The covenants of warranty estop the tenant from denying the husband's seizin.⁸

SEC. 318. A guardian, being mother of her ward, and having a dower interest in his real estate, applied for a sale

1 *Stimson v. Thomaston Bank*, 28 Maine, 259.

2 *Brown v. Potter*, 17 Wend. 164; *Norwood v. Marron*, 4 Rev. & B. 442.

3 *Smith v. Ingalls*, 13 Me. 284.

4 *Cochran v. Libby*, 17 Me. 39; *Osterhout v. Shoemaker*, 3 Hill, 513.

5 *Fellman v. Bowen*, 8 Gill. & J. 383.

6 *Perry v. Calhoun*, 8 Hump. 551.

7 *Grandy v. Baily*, 3 Ind. 221.

8 *Thorndike v. Spear*, 13 Maine, 91.

of her ward's real estate, describing it as the entire title. The order was made and the sale completed accordingly, without any mention of her interest. She was estopped from setting it up.¹ So A., being in possession of land, claiming title during his marriage with B., conveyed it to C., with general covenants of warranty, and delivered possession to C., which C. retained, deriving neither title nor possession from any other source. Upon the decease of A., B., his widow, claimed dower in the premises. C. was estopped from showing title in a third person with whom he did not connect himself, or from claiming an adverse possession.² In an action of ejectment for dower, a purchaser, as well as the heir holding under the husband, or deriving title from under him, is estopped from denying the husband's title.³

SEC. 319. A release of dower in a mortgage deed works an estoppel, not only in favor of the mortgagee, but also of those who become entitle, by equitable substitution to its benefits.⁴ But a release of to a person who has conveyed the land by such deed, creates no estoppel in favor of any other person than the releasee. Thus, where the release was to a stranger to the title, it did not extinguish the right of dower, but if the stranger subsequently acquires the title, the release operates to bar the dower as to him by way of estoppel.⁵ Although a wife has signed a deed of certain premises, with her husband, she is not thereby estopped to claim dower therein, when the deed contains no words indicating her intention to release her right of dower.⁶ A widow who has received dower shall not claim land settled on her in jointure. If a widow, who is also devisee, release to a purchaser for a valuable consideration, she is deemed as having conveyed, in every character which gives effect to her deed, and she cannot set up that she conveyed only under a power, that she disaffirmed the provisions for herself in the will and took her dower and did not release that.⁷

¹ Wiseman v. Macy, 20 Ind. 239.

² Ward v. McIntosh, 12 Ohio S. 231.

³ Chapman v. Schroeder, 10 Geo. 321; Hale v. Mann, 4 Gray.

⁴ Dearborn v. Taylor, 18 N. H. 153.

⁵ Harriman v. Gray, 49 Me. 537.

⁶ Lathrop v. Foster, 51 Me. 367.

⁷ Dundas v. Hitchcock, 12 How. 256.

CHAPTER XII.

ESTOPPEL IN PAIS, AND EQUITABLE ESTOPPELS.

SECTION 320. In addition to the branches of estoppel of which we have treated, there is still another class equally important, founded on equitable principles, which consist of admissions, which are again divided into two classes. They are solemn admissions or admissions *in judicio*, which have been solemnly made in the course of judicial proceedings; their "solemnity" being apparently derived from the almost religious solemnity with which justice was dispensed in England, under the old civil law, which, in America, has in a great measure been dispensed with. And *unsolemn admissions extra judicium*, which have been acted upon or were made to influence the conduct of others, or to derive some advantage to the party which cannot be afterwards claimed without a breach of good faith, that are known as Estoppels in Pais, or equitable estoppels. This class of estoppels, with the exception of their application to the peculiar relation of landlord and tenant, of which we will treat hereafter, have their origin in equity, and by universal custom have become a well settled and important branch of the law. Under the old English decisions, the mere acts, statements and admissions of a party, when not made or performed under seal, of record, or in the course of some of those acts to which peculiar authority was attached by law, were not considered as estoppels, and had no other effect or weight than evidence, more or less strong, but which might be explained or rebutted.¹ But the later decisions in England and America, have given a much broader scope to the doctrine of estoppels in pais than they originally possessed, and the law has been established to be, that whenever an act is done or a

¹ 1 Heane v. Rogers, 9 B. & C. 577.

statement made by a party, which cannot be contravened or contradicted without fraud on his part and injury to others, whose conduct has been influenced by the act or admission, the character of an estoppel will attach to what would otherwise be mere matter of evidence, and it will become binding on a jury, even in opposition to proof of a contrary nature.

SEC. 321. Equitable estoppels only arise when the conduct of the party estopped is fraudulent in its purpose or unjust in its results, and this forms the distinction between the common law doctrine of estoppel, and that which has grown up under the influence of equity, in modern times.¹ Every solemn admission under seal was regarded as an estoppel by the older law, even where it was not shown to have been injurious to others, and might have been withdrawn without wrong by the person by whom it was made ; the estoppel in pais of a feoffment was of the same nature as that of a sealed instrument.

SEC. 322. The law in regard to admissions has always been to treat them against the interest of the party making them and therefore probably true. But in regard to the admissions implied from the conduct and assumed character of the party, it cannot be supposed that at the time of the principal act or declaration the party believed himself to be speaking or acting against his own interest, but often to the reverse.² This class of admissions are therefore treated as a substitute for the ordinary and legal proof, either by virtue of the direct consent and waiver of the party, or on the grounds of public policy and convenience in the case of those implied from assumed character, acquiescence or conduct.¹ In regard to the conclusiveness of admission, it must be remembered that the genius and policy of the law favor the investigation of truth by all convenient and expedient methods, and that the doctrine of estoppels by which further investigation is precluded being an exception to the general rule, founded on convenience and for the prevention of fraud, is not to be extended beyond the reasons on which it is founded. They

¹ Taylor v. Ely, 25 Conn. 250; McAflerty v. Conover, 7 Ohio State, 99.

² 1 Greenleaf Ev.

bind only parties and privies. When verbal admissions are held conclusive, they are rendered effectually so by not permitting the parties to give any evidence against them. This class of admissions which have been held conclusive against the party, are those on the faith of which a court of justice has been held to adopt a peculiar course of proceeding, or on which another person has been induced to alter his condition; while an admission may be conclusive in a civil action it may not be regarded as even admissible evidence in a criminal one. Thus, where a party was charged with misapplication of money received from the government, the admission of his agent and receiver was held conclusive of the fact of the receipt of the money, but was not admissible to establish the charge of criminal misapplication of it.¹ So that while a matter *in pais*, may be conclusive in a civil action it would not be admissible in a criminal one. Admissions which have been acted upon by others are conclusive against the party making them in all cases, between him and the person whose conduct he has thus influenced, and it is of no importance whether they were made in express language to the person himself or implied from the open and general conduct of the party. In treating of this branch of estoppel, it is to be remembered that etoppel *in pais* and equitable estoppels are one and the same; though designated by either term.

SEC. 323. The well established and often recognized fundamental principle of law. *Nullus Commodum Capere Potest De injuria Sua Propria*. That no man shall take advantage of his own wrong, is fully recognized in all courts of law and equity, and is one of the most essential elements in an equitable estoppel, or estoppel *in pais*, which, as a principle of law, is founded on the strictest morality. As this class of estoppels are founded upon the principle of equity and justice that no man shall take advantage of his own wrong, where one by his words or conduct wilfully causes another to believe the existence of a certain state of things, and induces him to act on that belief, so as

¹ 29 How. State Trials, 764.

to alter his own previous position, the former is estopped from averring against the latter a different state of things as existing at the same time.¹ If a party uses language which in the ordinary course of business and the general sense in which the words are understood, conveys a certain meaning, he cannot afterward say that he is not bound, if another so understanding has acted upon it. If any person by a course of conduct or by actual expressions so conducts himself that another may reasonably infer the existence of an agreement or license, whether the party intends that he should do so or not, it has the effect that the party using that language, or who has so conducted himself, cannot afterwards gainsay the reasonable inference to be drawn from his words or conduct.² Before the party is concluded by an estoppel, it must appear, first, that he has made an admission which is clearly inconsistent with the evidence he proposes to give, or the title to the claim he proposes to set up. Second, that the other party has acted on the admission. Third, that the other party will be injured by allowing the truth of the admission to be disproved. Where the acts and representation of the party must have influenced the other to do acts which he would not otherwise have done, and where a denial or repudiation must operate to the injury of such other party, the estoppel is created. In discussing the matter of estoppel, the court in *Welland Canal v. Hathaway*³ thus speaks of acts *in pais*: "An estoppel is so called because a man is excluded from saying anything, even the truth, against his own act or admission. The acts set up in this case, it is not pretended, constitute a technical estoppel which can only be by deed or matter of record. But it is said they should operate by way of estoppel,—an estoppel *in pais*. Such estoppels cannot be pleaded, but are given in evidence to the court and jury, and may operate as effectually as a technical estoppel under the direction of the court. There are many acts which have been adjudged to be estoppels *in pais*, such as livery, entry, acceptance of

¹ *Pickard v. Sears*, 6 Ad. and El. 469.

² *Cornish v. Abingdon*, 4 H. & N. 549.

³ 18 Wend. 813.

rent, &c., but in many and probably most instances, whether the act or admission shall operate by way of estoppel or not, must depend upon the circumstances of the case. As a general rule, a party will be concluded from denying his own acts or admissions which were expressly designed to influence the conduct of another, and did so influence it, and when such denial will operate to the injury of the latter.¹ Admissions, whether of law or of fact, which have been acted upon by others, are conclusive against the party making them, in all cases between him and the person whose conduct he has thus influenced. It makes no difference in the operation of this principle whether the thing admitted be true or false; it being the fact that it has been acted upon that renders it conclusive.²

SEC. 324. Equitable estoppels are only called into existence for the prevention of wrong and redress of injury, and will not be carried further than is necessary to answer the purpose for which it was created. This forms the great distinction between legal and equitable estoppel. The estoppel known to the earlier common law took effect in all cases, when once called into being, without regard to the consequences which would result from its application, and produced an inflexible barrier which was incapable of yielding to circumstances.³ A declaration or admission will not give rise to an estoppel unless made with full knowledge of the right alleged to be precluded; but a man who takes an active part in leading others into error, cannot ask that the consequences of his mistake shall be thrown on them.⁴ When an act is done or a statement made by a person, which cannot be contradicted or contravened without fraud on his part and injury to others whose conduct has been influenced by the act or admission, the character of an estoppel will attach to what would otherwise be mere evidence. The estoppel must be limited within such bounds as are sufficient to put

¹ *Titus v. Morris*, 40 Maine, 348.

² *Gillespie v. Carpenter*, 25 How. Pr. 203; *Coleman v. McClure*, 47 Barb. 206.

³ *McAfferty v. Conover*, 7 Ohio State, 99.

⁴ *Witcher v. Williams*, 20 Conn. 98; *Worrall v. Lathrop*, 30 Vt. 307; *McAfferty v. Conover*, 7 O. State, 99.

those who have dealt on the faith of appearances that turn out to be incorrect in the same position with reference to the author of such appearances as if they were true.¹

SEC. 325. No equitable estoppel can arise without proof that a wrong has been done, or is threatened, on one side, and injury suffered, or justly to be apprehended from it, on the other, nor unless the injury is so closely connected with the wrong that it might and ought to have been foreseen by the guilty party. There must be some degree of wrong,² for a statement innocent in itself, and susceptible of being withdrawn or contradicted, cannot be rendered binding by anything that occurs subsequently, unless it is made with full knowledge that it will or may be acted upon,³ when the mere attempt to retract is, in itself, a wrong. The first step in charging a party with the consequences of a false impression on which another has acted, is to know that he knew the impression existed and the result to which it would lead if not corrected.⁴ No estoppel can grow out of the answer to a question put incidentally, and without communicating the intention of the party who asks it, to be guided by the reply,⁵ because, under these circumstances, whatever may be the injury on the one side, there is no implied fraud on the other.⁶

SEC. 326. Equitable estoppels are, in a great degree, designed to prevent circuitry of action, by preventing injuries by which redress would have to be sought by suit, and can not arise unless the evidence discloses some default or fraud for which compensation might be awarded by equity or law. The wrong must be coupled with an injury, and with injury, that is the legal result of the wrong, for where the public is not a party, and the suit is a purely private one, courts of justice sit for the purpose of awarding re-

¹ *Smith v. Merton*, 33 Ill. 230; *Knobel v. Kirch*, 33 Ill. 307.

² *Crest v. Jack*, 3 Watts, 233; *Commonwealth v. Moltz*, 10 Penn. 521; *Taylor v. Ely*, 25 Conn. 250.

³ *White v. Langdon*, 30 Vermont, 509; *Foster v. G. M. Life Ins. Co.*, 3 Ellis & B. 48.

⁴ *Hill v. Epley*, 31 Penn. 331.

⁵ *Peirce v. Andrews*, 6 Cush. 4.

⁶ *Wakefield v. Crossman*, 25 Vermont, 290.

dress and compensation, and not for that of inflicting punishment. Therefore an estoppel does not arise and will not grow out of a mere falsehood, however flagrant, unless its results are such as to render the action of the law necessary, to prevent some one who has been misled by it from suffering on the one hand, or the guilty party from gaining an undue advantage on the other.

SEC. 327. To give rise to an equitable estoppel, there must be a wilful representation by one party, made with an intention that it should be acted on by the other; or where they are of a nature to be injurious, injury may be inferred; that is, no one should be estopped from alleging the truth, unless his false assertion or equally culpable silence have been the inducement to a course of action which would result in a loss, if he were permitted to change his position, and enforce the right which he has thus expressly or virtually waived. The question, in such cases, is not so much what was meant, as what the meaning must have been understood to be; and a man who uses words that can only be interpreted by those to whom they are addressed as an unqualified assurance, will not be permitted to allege subsequently, to their injury, that he wished or intended them to be taken in a different sense.¹

SEC. 328. The doctrine of equitable estoppel is founded upon the principle that a party has, by his own voluntary act, placed himself in such a situation in regard to some fact, that he is precluded from denying it. Its application to the dealings and contracts of men is a salutary one—that a man shall not be permitted to deny what he has once solemnly acknowledged. They will not be carried further than is necessary for the attainment of the object, and they may be waived or enforced at the pleasure of the party who has acted on the faith of the representation or admission out of which they arise. The technicalities incident to estoppels have been gradually giving way to considerations of reason and practical utility, and the courts

¹ *Patterson v. Lyttle*, 11 Penn. 53; *Simons v. Steele*, 36 N. H. 73; *Wharton v. Hardisty*, 8 El. & B. 232; *Forsyth v. Day*, 46 Maine, 176.

seem disposed to give force and efficacy to a doctrine which is based upon principles of justice and the purest morality.

SEC. 329. Equitable estoppels are as binding upon privies as legal estoppels, and are as effectual in courts of law as in equity. The act or assertion must be wilful, with intent to deceive the other party. Parties are only estopped from denying their own acts when the denial operates to the injury of another, and when such expressions are expressly designed to and do influence the conduct of such person. "An admission by the defendant intended to influence the conduct of the man with whom he is dealing, and actually leading him into a line of conduct which must be prejudicial to his interest, unless the defendant be cut off from the power of retraction, is the very definition of an estoppel *in pais*."¹ But a man can be estopped from denying only what he has once admitted. An estoppel *in pais* is to be resorted to solely as a measure to prevent injustice. Always as a shield, but never as a sword.² Where a party fails to make his rights known, where fairness and good conscience require that he should do so to protect the interests of others, he cannot be heard as against them to assert such rights.³ Estoppels *in pais*, as well as those which are technical estoppels, must be reciprocal.⁴

SEC. 330. A person who intentionally or by culpable negligence induces another to act on his representations will be estopped from denying their truth. Under the circumstances creating the estoppel, representations made by words, acts, or silence when duty requires the party to speak are conclusively presumed to be true as against him and in favor of the person whom he has misled. The estoppel is called into life for the purpose of preventing wrong and redressing injury, and being never carried further than is necessary to prevent one party from being injured by his reliance on the acts of another, and therefore no declarations or acts give rise to an estoppel unless they have been relied and acted

¹ Delzell v. Odell, 3 Hill, 215.

² Pierrepont v. Barnard, 5 Barb. 364.

³ Floyd v. Lee, 45 Ill. 277.

⁴ Welland Canal Co. v. Hatheway, 8 Wend. 480.

upon, and unless their denial would prejudice the person in whose favor the estoppel is introduced. Thus a declaration or act retracted before it is acted upon, does not raise an estoppel; it may exist for one purpose and not for another and in favor of one person and not in favor of another, though growing out of the same transaction.¹ A party who has receipted for goods, as the property of the defendant in attachment, may prove property in himself in a subsequent suit brought for the goods by the plaintiff in attachment, in mitigation of damages can neither be benefited by the goods, nor injured by their loss, unless they actually belong to the defendant; but if it is shown that there was other property of the defendant in the attachment, which would have been seized but for his acts and declarations, he will be estopped from proving title subsequently either in mitigation of damages or in bar.² While a man, whose goods are wrongfully sold under a writ against another may bid at the sale to raise their price to a fair value, and with a view to his own protection, without losing the right of redress from the officer making the sale;³ he is estopped from questioning the title of the purchaser. Where a sheriff had a writ commanding him to arrest A. and took into custody "B." who represented that she was the person named in the writ. The sheriff after ascertaining his mistake was compelled to discharge B., but B. was estopped by her representations from suing the sheriff for the original taking. In order however to raise an admission or statement by one party from the rank of evidence to the dignity of an estoppel, it must not be shown that its retraction would be injurious to the other but that the injury results from a course of action induced by the admission.⁴ Thus if a man induces a tradesman to supply a woman with goods by representations that she is his wife, he will be concluded by the representa-

¹ *Brusley v. Hamilton*, 15 Pick. 32; *Wilder v. Cit. St. Paul*, 12 Minn. 202; *Combs v. Cooper*, 5 Ib. 254.

² *Deweys v. Field*, 4 Met. 384.

³ *Heane v. Rogers*, 9 Barn. & C. 517.

⁴ *Dunlap v. Patterson*, 2 C. B. N. S. 495.

tion and will not afterwards be permitted to show that she was not his wife.¹

SEC. 331. Equitable estoppels are always applicable, in cases where an attempt is made to assert a right, subsequently, to the injury of others, which was waived by acquiescence at the time. Thus a man who induces another to comply with an award by alleging that the submission embraced all his demands, is estopped from afterwards enforcing a claim which was fraudulently withheld from the arbitrators.² And in the same way a party who prevents a plaintiff in an action from exacting bail, by an assurance that he has already entered into a recognizance for the appearance of the defendant, is estopped by his action from relying on the insufficiency of the recognizance as a defence to a suit brought upon it for the debt.³ But where both parties know, or have the means of knowing, and each is equally in fault, neither can have any equitable claim to relief against the other,⁴ and it matters not that means were used to deceive, if the other party was not in point of fact misled.⁵ The estoppel is not extended beyond its requirement to prevent one party from being injured by his reliance upon the acts or declarations of the other.⁶ Where the possession of goods is obtained on the faith of an admission of the right of the person, from whom it is derived. The admission is only binding while possession is retained.⁷ This rule is the same in every case where the admission is relied on as conclusive, and limits the estoppel to what is necessary to put the parties in the position which they would have occupied had the admission not been made.⁸ In order to create an estoppel *in pais*, or equitable estoppel, as defined and established by the law at the present time, there must be an admission intended to influence the conduct of the

¹ Case v. Farrer 12 Min. 89.

² Wyman v. Perkins, 89 N. H. 219.

³ Hanly v. Middlebrook, 28 Conn. 527.

⁴ Commonwealth v. Nancy, 10 Penn. 527.

⁵ Jewett v. Miller, 10 N. Y. 42; Larkins' Appeal, 38 Penn. 427.

⁶ Kinney v. Farnsworth, 17 Conn. 345; Miller v. Cresson. 5 W. & S. 284.

⁷ Johns v. Church, 12 Pick. 307.

⁸ Bocoek v. Pavey, 8 Ohio S. 270.

man with whom the party is dealing, and actually leading him into a line of conduct prejudicial to his interest, unless the party estopped be cut off from the power of retraction. A better definition is given by Bronson, J.,¹ who said, to constitute an estoppel *in pais* against a party, there must be, 1st, an admission inconsistent with the evidence which he has proposed to give, or the title or claim which he proposes to set up; 2d, an act done by the other party on the faith of such admission; 3d, an injury to him by allowing the injury to be disproved. This definition shows that the difference between this kind of an estoppel and legal estoppels, is that the inference that the admission was the basis of the act or covenant and cannot be justly retracted, which is drawn in the one case by the law from the seal, and must be supplied in the other by proof. Thus, where a party who had pointed out certain property as belonging to an execution debtor, and stands by and sees the sheriff sell it as the property of the defendant, he is estopped from contradicting these statements and proving property in himself, and this principle extends to every case where an unauthorized sale is expressly or impliedly sanctioned by the owner, and it estops him from setting up his own right against the purchaser.

SEC. 332. Estoppels must ordinarily be mutual and will not extend beyond the parties to the contract or transaction in which they arise.² A declaration or admission made to one man can seldom be absolutely conclusive in favor of another;³ but when the statement is meant to influence the conduct of third parties, this rule does not apply. It embraces in its conclusive effect parties and privies and estops all who claim under the person originally barred. Thus, the buyer of a chattel was held to be within the bar of an estoppel *in pais* growing out of the acts and declarations of the vendor.⁴ And the rule is the same in regard to an estate in land,⁵ but as the interest conferred by an estoppel

¹ Delzell v. Odell, 3 Hill, 219.

² Griffin v. Richardson, 11 Ired. 439; Hoffner v. Noble, 11 Ill. 531; Wright v. Hazen, 24 Vermont, 143.

³ Heane v. Rogers, 9 Barn. & C. 517.

⁴ McCrevey v. Remson, 19 Ala. 430.

⁵ Barber v. Edson, 35 Vermont, 304; Herbert v. Norcross, 35 N. H. 19; Snodgrass v. Ricketts, 13 Cal. 354.

of this description is where real estate is involved, essentially equitable, subsequent purchasers will not be bound without notice. A judgment creditor is generally subject to every equity that would have been binding on the debtor.¹ An estoppel can never be founded upon an omission to object to the performance of an act which was lawful when done by the party doing it, or for an omission to deny an assertion which was true when made. It is when a party stands silently by, and sees an unwarrantable act done to his property, or hears a false and injurious declaration made in relation to his rights, that he is estopped from subsequently questioning the act or statement to the prejudice of an innocent party.² No one can be estopped from refusing to do an illegal act, and an estoppel can only operate in favor of a party injured in a case where there is no provision of law forbidding the party against whom the estoppel is to operate from doing the act which is sought to be carried out through its operation.³

SEC. 333. Where a declaration is so general in its terms, or made under such circumstances as to indicate that it was intended to reach third persons, or the community at large, the estoppel will be extended far enough to protect every one who may have been presumed to have acted or been governed by it.⁴ While a bond signed and sealed in blank may not (according to some authorities) be valid between the parties, it is binding when it is in the hands of third parties after it has been filled up by the obligee. Thus, a recital in a deed that a judgment given for the price had been paid, was held to estop the grantor from setting it up against subsequent creditors, who, though not technically privies, might have refrained from trusting the grantee, if the judgment had still been in force.⁵ And an alley which

¹ *Brace v. Duchess of Marlbourgh*, 2 P. Wm. 471; 2 Lead. Cases in Equity, 3 Ed. 108.

² *Corning v. Troy Nail Factory*, 39 Barb. 31.

³ *N. Y. v. N. H. R. R. Co. v. Schuyler*, 34 N. Y. 30.

⁴ *Mitchell v. Reed*, 9 Cal. 204; *Graff v. Pittsburg & Stenbenville R. R. Co.*, 31 Penn. 489; *White Mt. Bank v. West*, 46 Me. 15; *Quick v. Thomas*, 6 Mich. 76; *Cary v. Clark*, 13 La. 465; *Crawford R. R. v. Lacy*, 2 G. & J. 79

⁵ *Waters' Appeal*, 35 Penn. 523.

had been treated for a number of years as the common property of the owners of the adjacent houses, cannot be closed by one of them against a purchaser, who may be presumed to have purchased on the faith of the appearance.¹ Courts go a great ways in presuming that acts and declarations calculated to influence third persons have, in fact, reached their ears and induced them to buy. In another case² it was held that *bona fide* purchasers who, by the deceptive acts of acquiescence of the wife in the will of her husband, might have had reasons for believing that its provisions would not be disturbed or would estop her, though it cannot be shown that the purchasers acted on that belief. This extension of equitable estoppels is peculiarly applicable to those statements which like letters of credit or the prospectus of an insurance company, are addressed to all the world, and where the defendants had advertised that they would not refuse the payment of a loss on any ground short of fraud, they were held estopped from taking advantage of a failure to comply with the requisitions of the policy which was not actually fraudulent.³ There can be no estoppel in equity or on any principles of equity unless the person who asks relief from the rigor of the law is a purchaser in the large and liberal sense in which the term includes all who have given value, or changed their position for the worse in reliance on the acts or declarations of others.⁴ A donee or devisee cannot, therefore, enforce an estoppel which would not have been valid in favor of the donor or deviser, and the same principle applies to every one who takes a conveyance or assignment without giving anything in return, and will, therefore, be in no worse condition if the title which he has fails than he was before.⁵

SEC. 334. Estoppels are strictly construed, and are not allowed as instruments of fraud, but only to prevent injustice.

¹ Lewis v. Carstairs, 6 Wharton, 193.

² Ackla v. Ackla, 6 Penn. 228.

³ Wood v. Dwarries, 11 Echq. 493.

⁴ Weaver v. Lynch, 25 Penn. 419; Goodhue v. Scamwell, 3 Cal. 827; Thompson v. Thompson, 9 Ind. 323.

⁵ Weaver v. Lynch. 25 Penn. 419.

SEC. 335. There can be no estoppel where the act or representation is made or done afterwards. Thus in an action of replevin brought for a mare, levied on by the defendant under an execution against a third person, the plaintiff was permitted to show that the third person had no title, although he had declared some months previously that the mare was the common property of both. The court held that if this statement had been made at the time of the levy it would have been conclusive, but that as it occurred in the course of another transaction it was to be regarded in the light of an ordinary admission, and was consequently open to explanation and contradiction, whatever the loss on one side and the degree of moral wrong on the other may be, there will be no estoppel unless the loss is the direct and natural result of the wrong; nor unless it is clearly apparent that the injurious influence exercised by the acts and declarations which constitute the estoppel, if not intended might have been foreseen. A man will not be bound by an answer to a question asked without disclosing the object, and which he may reasonably deem frivolous or impertinent, nor unless he has notice that the person by whom it is put means to shape his course by the answer. Thus it was held, that a representation by the defendant in an execution, that the goods seized by the officer were the property of his brother, did not estop him from proving that they were really his own, although the sheriff went on to sell them, under a suit against the brother, if the existence of which the defendant was ignorant, because the circumstances of the case, taken as a whole, were such as to show that the representation was not meant to bring about the sale, then the sale was not the result of the representation.¹ A declaration to one man can rarely operate as an estoppel in favor of another, not only because what is learnt merely through report seldom has much influence on conduct, but because it would be unjust in most cases to carry the responsibility arising from a statement further than the person to whom it is addressed, or render the person answerable for every act that may be built on it by stran-

¹ Freeman v. Cook, 2 Exchq. 653; Howard v. Hudson. 2 S. & B. 1.

gers. Thus a letter written to an assignee of a bond, acknowledging that it was justly due, was not held to be an estoppel in suit brought for the benefit of a third person, by whom the bond was subsequently purchased, because there was no evidence that the purchaser had seen the letter or was influenced by it in purchasing the bond.¹

SEC. 336. No man can adopt that part of a transaction which is favorable to him, and reject the rest to the injury of those from whom he derived the benefit.² This application of the law of equitable estoppel admits of less mistake or misapprehension than any other, and is a favorable doctrine with all tribunals whenever the circumstances are such as to admit of its application. Therefore, where those who are entitled to avoid a sale, adopt and ratify it, equity will estop them from afterwards setting it aside for reasons which are too plain for statement.³ Where a sale of land is made no one can be permitted to receive both the money and the land. Even if the vendor possessed no title at the time of the sale the estoppel would operate upon a title subsequently acquired. Equitable estoppels of this character apply to infants as well as adults, to insolvent trustees and guardians, as well as to persons acting for themselves, and have place as well where the proceeds arise from a sale by authority of law, as where they spring from the act of the party. The receipt of the purchase money is an affirmance of the sale whether it were void or only voidable. Thus, where a husband and wife were seized of an estate by entireties, the husband, by will, directed the land to be sold, and the proceeds divided amongst his children, and died leaving a wife and a number of children; having named no one to make the sale, the land was sold under an order of court, and bought by two of the children, at the request of the widow, who received her share of the proceeds, in accordance with the will. After her death, in ejectment for the land by the heirs, held they were estopped. If she were inno-

¹ Eldred v. Hazlitt, 33 Penn. 307.

² Males v. Lowenstein, 10 Ohio S. 512.

³ Johnson v. Fritz, 44 Penn. 472; Pickens v. Yarborough, 30 Ala. 408; *Bo-
cock v. Pavey*, 8 Ohio S. 270; *State v. Stanly*, 14 Ind. 109.

cent of her rights, she would be estopped upon the principle that, where one of two innocent persons must suffer, it shall be he who caused the injury. One who encourages another to purchase land, and spend money on it, cannot set up a better title in himself to defeat the purchaser. Silence alone will not postpone unless it is a fraud, but positive encouragement without fraudulent intent will bar the assertion of a right. It makes no difference, if the defect in the title might have been discovered by the purchaser, he has been put off his guard, and a party cannot have the price of the land, and the land itself. The acceptance by the widow and heirs, was an affirmation of the sale, whether it was void or voidable.¹ And where a court decrees the sale of an adult's lands, and he assents to it, he is estopped.² It makes no difference in the application of this principle, whether the proceedings under which the sale occurs are voidable or wholly void, in consequence of the want of jurisdiction.³ The design and utility of the estoppel is to prevent the gross injustice that must necessarily arise, where a man accepts all the benefits from an act that it is capable of conferring, and then sets it aside to the injury of third persons.

SEC. 337. A defendant in an execution is estopped from questioning the validity of the writ or judgment by allowing the purchaser to make payments to the sheriff in satisfaction of the judgment debt.⁴ A defendant who has notice that his property is about to be sold by the officers of the law for the payment of his debts, and who makes no objection until an innocent purchaser has paid the purchase money and received a deed duly acknowledged, is estopped from objecting afterwards. Even if the judgment on which it was sold was paid, the payment cannot be set up against such a purchaser.⁵ Where parties have admitted and acted upon instruments, they are estopped from denying them, unless the admissions were made by mistake or procured by fraud. Where the grantor

¹ *Maple v. Russart*, 53 Penn. 348.

² *Sange's Appeal*, 53 Penn. 383.

³ *Spragg v. Schriever*, 25 Penn. 282; *Merritt v. Hone*, 5 Ohio St. 307.

⁴ *Mitchell v. Freedy*, 10 Penn. 208; *Crowell v. Meconky*, 5 Penn. 176.

⁵ *Dean v. Connely*, 6 Penn. 231.

of land passed it by deed to A., and after the death of the grantor his heirs recognized the deed and confirmed it upon the death of the grantee the property descends to his heirs. One who is cognizant of all these transmissions and assented to them, cannot go behind these links of title to dispute them. A party ought not to be heard to contradict and falsify his own solemn admissions and declarations made before judicial tribunals. When an ancestor has acquiesced in acts so as to conclude her, her heirs are likewise concluded.¹

SEC. 338. Where money is borrowed to make a purchase, and title taken in the name of the lender of the money to secure his advances, he is estopped from pleading illegality of the purchase, so as to retain the property.² Where a party received money of a person legally intrusted with it and interested in it, and contracted to deposit it to the credit of such person, he is estopped, in a suit for such recovery, from setting up as a defence the rights of some third person with whom he had no contract.³ Where a party is bound to pay a sum of money upon the happening of a particular event, his preventing the happening of that event operates as an estoppel.⁴ An agreement to cancel and release mutual claims, or discontinue mutual suits, is a mutual accord and satisfaction, and either party may rely on it as an estoppel against the prosecution of the suit or claim by the other. Every person is considered to be acquainted with the law, both civil and criminal, and no one can, therefore, complain of the misrepresentations of another respecting it.⁵ A judgment debtor who has mingled, with goods levied on by the sheriff, other goods of the same description, and refuses to designate them to the sheriff, will be estopped from a recovery against the sheriff for seizing those with the rest.⁶

SEC. 339. The declarations on the part of an inventor that he did not intend to take out a patent, but to let the

¹ Porter v. Hill, 30 Tex. 529.

² McMicken v. Perrin, 18 How. 507.

³ Sinclair v. Murphy, 14 Mich. 392.

⁴ Bleeker v. Bond, 3 Wash. C. C. 529.

⁵ Platt v. Scott, 6 Blackford, 389.

⁶ Roth v. Wells, 29 N. Y. 471.

public have his invention, will estop such party, or any one holding under him, from asserting his right against a person acting on the faith of his representations.¹ Where one has advertised a patented article as one of the most useful of inventions, and one which has superseded all similar articles, and has also sold such articles for use, such person is estopped, in an action against him for an infringement of the patent, from denying the utility of the invention.² An inventor can have but one single valid patent for his invention. The first he obtains, while it is unrepealed, is an estoppel to any future patent for the same invention.³ A grant of a subsequent patent for an invention, is an estoppel to the patentee to set up any prior grant for the same invention, which is inconsistent with the terms of the last grant.⁴

SEC. 340: Where, in a written contract for the erection of a house, a question arose whether certain work was extra work, and the question was submitted to the architect, who decided that such was extra work, the owner is, by such submission, estopped from afterward denying that it was extra work.⁵ Where a district township has exercised jurisdiction over certain sections claimed by another district, by collecting taxes therefrom and providing schools for the children resident thereon for several years, during a portion of which time the other district has refused admission to its schools for scholars residing on the section thus in dispute, and has made no claim thereto, the latter district will be estopped from afterwards asserting its claim to the disputed territory.⁶ The United States having treated one as a collector, under a special act, during a certain period, were held to be estopped from denying his right to the compensation provided by the act.⁷

Where a man has cohabited with a woman, and treated her in the face of the world as his wife, he cannot deny this

¹ *Pitts v. Hall*, 2 Blatchford, 229.

² *Stanley v. Whipple*, 2 McLean, 35.

³ *Odiome v. Amesburg Factory*, 2 Mason, 28.

⁴ *Barrett v. Hall*, 1 Mason, 417.

⁵ *Stewart v. Keteltas*, 36 N. Y. 388.

⁶ *School Dist. v. Hobson*, 25 Iowa, 275.

⁷ *U. S. v. Collier*, 3 Bl. C. C. 325.

and claim to be her servant, in respect to her lands, which are taken in execution against him ;¹ and he cannot object to a creditor who supplied her with goods during the cohabitation, that she was not his wife.² The levy and sale of land by a sheriff, was left in doubt as to its extent by the terms of the deed ; and L., the purchaser, declared that a certain island and other land was not included ; these were afterwards purchased by S. If S. purchased in consequence of L.'s declaration, he and those taking from him by a deed subsequent, would be concluded.³

SEC. 341. It has been held in numerous cases, that in the action for use and occupation, the possession of the defendant by the plaintiff's permission being made out, the former will not in general be allowed to dispute his landlord's title. A receiptor of property to the sheriff who has taken it in execution, is estopped to question the sheriff's title, though he have suffered it to remain with another by whom it is eloigned.⁴ Where one was present when a levy is made by an officer, and does not deny the right of the officer to make the levy but furnished a list of the property to be levied on, takes an active part and assist the officer, advises bystanders to bid and disapproves another's forbidding the sale ; although it may appear that such conduct is wilful and fraudulent for the purpose of deceiving the officer the party so conducting himself is estopped from afterwards alleging the officer to be a trespasser. Again : the plaintiff in possession of land, was hired by the defendant to depasture his cattle on the land. In assumpsit for the price, the defendant was holden concluded, and could not with a view to invalidate the contract, show the land to be his own and not the plaintiff's.⁵

SEC. 342. A party is usually concluded by admissions or conduct upon which others have been induced to act ; and where, if he were permitted to prove that such admissions or conduct were false, such permission would operate as an

¹ Divall v. Leadbetter, 4 Pick. 220.

² Jennings v. Whittaker, 4 Monroe, 52.

³ Swartz v. Moore, 5 Serg. & Rawle, 257.

⁴ Philpots v. Hall, 8 Wend. 610.

⁵ Eastman v. Tuttle, 1 Cowen's Rep. 248.

injury to the persons who were misled by them. Such admissions and conduct, although they cannot operate as a technical estoppel, which can be by deed or record only, operate by way of an estoppel *in pais*. The party shall be estopped, where his intent was to influence the other, or derive a credit or advantage to himself.¹ Thus where one of several defendants had a good cause of defence, and by the fraudulent device of the plaintiff was prevented from making it and also from making his motion within the time allowed by law to set aside the judgment, for mistake, inadvertence, surprise, or excusable neglect. The plaintiff and his administrator were estopped from enforcing his judgment against such defendant, and especially in the case where the plaintiff did not attempt to enforce it, but repeatedly asserted to such defendant that it was satisfied and released.² A party who pledges to another goods that he does not own, and at the same time makes a delivery of them, is estopped from setting up a title to the goods subsequently acquired during the existence of the pledge, and the pledgee may recover possession of them as against him or any other party possessed without right.³

SEC. 343. The class of solemn admissions which by law are characterized and have the force of estoppels, are generally, all agreements of counsel, which necessarily dispense with the legal proof of the facts admitted. Thus if a material allegation, well pleaded, is admitted by the adverse party, it matters not whether it be by pleading some other matter or demurring at law it be conclusively admitted.⁴ A party cannot contradict by parol evidence what the pleadings themselves admit in the very cause on trial. Nor can the jury find contrary to those admissions which are made at the trial, they are conclusive against the party making them.⁵ So is a stipulation by an attorney on record

¹ Tufts v. Hayes, 5 N. H. 453; Kingsley v. Vernon, 4 Sand. 361; Young v. Fonte, 43 Ill. 43; Ray v. Bell, 24 Ill. 444.

² Johnson's Adms. v. Unwersaw, 28 Ind. 435; Stone v. Lamon, 28 Id. 97.

³ Goldstein v. Hart, 30 Cal. 372.

⁴ Young v. Wright, 2 Campb. 139; Wilson v. Turner, 1 Taunt. 398; 1 Greenleaf Ev.

⁵ Vandervoort v. Smith, 2 Cam. 155.

to admit certain facts on trial of the cause.¹ The mere silence of counsel on the trial, as omitting an objection to a defect in the testimony, will conclude the client, even in respect to the existence of records, documents, and other testimony of the most important character, on the familiar principle that a silent concession has been acted upon by the other party, or that he has omitted evidence which he would otherwise have produced.

SEC. 344. The admissions of attorneys of record bind their clients in all matters relating to the progress and trial of the cause. But in order to have this conclusive effect it is necessary that they should be distinct and formal or of the nature of those which are termed solemn admissions made for the express purpose of alleviating the stringency of some rule of practice or dispensing with the formal proof of some fact at the trial as a substitute for the regular legal evidence of the fact. Judicial admissions or those made in court by the party's attorney, appear either of record, as in pleading, or in the solemn admission of the attorney, made for the express purpose of being substituted for the legal evidence of the fact at the trial, or in a case stated for the opinion of the court. Admissions made before trial relating to the course of proceeding in court, are equally under its control, in effect, by means of its coercive power over the attorney in all matters relating to professional character and conduct. But it must be remembered that the attorneys are engaged in the cause. But in cases of mistake where the admissions have been improvidently made, the court will generally relieve the party from the consequences of his error, "*non fatetur, qui errat nisi jus ignoravit*."

SEC. 345. *Consensus tollit errorem* is a maxim of the common law, and the dictate of common sense. The consent which cures error in legal proceedings, may be implied as well as expressed; for instance, where, at the trial of a cause a proposal was made by the judge, in the presence of the counsel of both sides, who made no objection, that the jury should assess the damages contingently, with leave to the

¹ *Alton v. Gilmanton*, 2 N. H. 520.

plaintiff to move to enter a verdict for the amount found by the jury, both parties were bound by the proposal, therefore the plaintiff's counsel was not at liberty to move for a new trial on the ground of misdirection,¹ for *qui tacet-consentire videtur*,² the silence of counsel implied their assent to the course adopted by the judge, and "a man who does not speak when he ought, shall not be heard when he desires to speak."³ Where the parties in an action before a justice of the peace, stipulate that the justice may take *five* days to render judgment, they will be estopped from alleging as error that the judgment was rendered on the fifth day instead of on the fourth day.⁴ A party entering into a stipulation in the trial of a cause, that the counter-claim set up by the defendant shall be withdrawn "without prejudice to the defendant's right to maintain an action thereon against the plaintiffs," is estopped from using the record as evidence in bar of an action subsequently brought on the subject of such counter-claim.⁵ Agreeing to a fact in a case stated, which the other party would have been estopped to assert, is a waiver of such estoppel. A stipulation by the attorney on record, to admit certain facts upon the trial of the cause is conclusive. Admissions made at the trial of a cause shall be taken as conclusive in that cause. In trespass *de bonis*, &c., the plaintiff's counsel disavowed claiming any damages by way of punishment or smart money; and the court held that this concluded him.⁶

SEC. 346. There is still another class of judicial or solemn admissions which have the binding effect and force of an estoppel, and that is, by payment of money into court.⁷ Here the defendant conclusively admits that he owes the amount thus tendered in payment; that it is due for the cause men-

¹ *Morrish v. Murray*, 13 M. & W. 52; *Booth v. Clive*, 10 C. B. 827; *Hughes v. Great Western R. C.* 14 C. B. 637; *Harrison v. Wright*, 13 M. & W. 816.

² *Jenk. Cent.* 32; *Gosling v. Veley*, 7 Q. B. 455.

³ *Martin v. G. N. R. R.* 16 C. B. 179.

⁴ *Barnes v. Badger*, 41 Barb. 98.

⁵ *Foster v. Milliner*, 50 Barb. 385.

⁶ *Wheelock v. Henshaw*, 19 Pick. 241.

⁷ *Boyd v. Moore*, 5 Mass. 365; *Blackburn v. Sholes*, 2 Campb. 241; *Rucker v. Palsgrave*, 1 Taunton. 419.

tioned in the declaration ;¹ that the plaintiff is entitled to claim it in the character in which he sues ;² that the court has jurisdiction of the matter ;³ that the contract described is rightly set forth, and was duly executed ;⁴ that it has been broken in the manner and to the extent set forth, and to the extent declared,⁵ and if it was a case of goods sold by sample that they agreed with the sample.⁶ In other words the payment of money into court admits conclusively every fact which the plaintiff would be obliged to prove in order to recover that money.⁷ But it is an admission to no greater extent, and admits nothing beyond that. But where there are several counts in a declaration and a part only of the sum demanded is paid into court without specification as to which count it is to be applied, the payment is an admission to this extent : it admits that the defendant owes the plaintiff the sum so paid on some one of the several counts, but is not an admission of an indebtedness under any one of them, nor a liability on all.⁸ If the contract is illegal or invalid, the payment into court gives it no validity. This rule of conclusiveness applies equally to criminal cases. Thus where a prisoner had been married according to the rites of the Roman Catholic church, having stated at the time that he was a Roman Catholic, upon an indictment for bigamy he was not permitted to show that at that time he was a protestant, in order to invalidate the marriage.⁹ The return to an execution, although made by the deputy in the sheriff's name, is the act of the sheriff, and when the question comes up directly between one of the parties and the sheriff, he is bound by the return and cannot impeach the truth of it.¹⁰ The return

¹ *Huntington v. American Bank*, 6 Pick. 340 ; *Bennett v. Francis* 2 B. & P. 550 ; *Seaton v. Benedict*, 5 Bing. 28 ; *Greenleaf Ev.* 234.

² *Libscombe v. Holmes*, 2 Campb. 441.

³ *Miller v. Williams*, 5 Esp. 19.

⁴ *Guttridge v. Smith*, 2 H. Black. 374 ; *Israel v. Benjamin*, 3 Campb. 40 ; *Cox v. Brain*, 3 Taunt. 95.

⁵ *Dyer v. Ashton*, 1 B. & C. 3.

⁶ *Leggett v. Cooper*, 2 Stark R. 103.

⁷ *Archer v. English*, 2 Scott N. S. 156.

⁸ *Hubbard v. Krous*, 7 Cush. 556 ; *Hingham v. Robbins*, 5 M. & W. 94.

⁹ *R. v. Orgill*, 9 C. & P. 80.

¹⁰ *Sheldon v. Paine*, 10 N. Y., 398 ; *Haynes v. Small*, 22 Me. 14 ; *Barrett v. Copeland*, 18 Vt. 69.

of a constable of personal service is conclusive of the fact, and the defendant cannot be allowed to prove on the trial that he was not served.¹

¹ Hubbard v. Chapin, 28 How. Pr. 407.

CHAPTER XIII.

ESTOPPEL IN PAIS.

ITS APPLICATION TO THE RELATION OF LANDLORD AND TENANT, VENDOR AND VENDEE, BAILOR AND BAILEE, ETC.

SECTION 347. Estoppels *in pais* in their common law origin seem to have arisen only in the case of those solemn and peculiar acts to which the law gave the power of creating a right or passing an estate, and there was as much importance and efficacy attached to estoppels *in pais* as to technical estoppels by record and deed. While a feoffment was a mere act *in pais*, it was the only manner by which an estate of freehold in actual possession could be conveyed, while the courts attributed and gave them far greater effect than was given to the deed which was used to perpetuate their existence, or to transfer a reversion in the same land, when held by a tenant of the grantor, and even in those cases, when a reversion was granted by deed, another act *in pais*, an attornment, was necessary to complete the grant; and being of the most solemn character, as establishing the feudal relation between the tenant and his new lord, was equally binding under seal or of record.¹ A man may be estopped as effectually by a matter *in pais* as by matter of record, and a party may be estopped by the acceptance of rent, or by entry, or by livery. The presumption of the law being that the act was done or accepted on the faith of an express or implied agreement that its validity should not be disputed, or the resulting obligation denied.

SEC. 348. The instances given by Coke, and, in fact, by all of the old legal writers, of examples of estoppel *in pais* are—by matter *in pais*, as by livery, by entry, by acceptance of rent, partition, and by acceptance of an estate. An estoppel by matter *in pais* occurs where one man has accepted

¹ Martin v. Ives, 17 S. & R. 364; Sparrow v. Kingman, 1 N. Y. 242.

rent of another ; he will be estopped from afterwards denying, in an action with that person, that he was, at the time of such acceptance, his tenant.¹ An illustration of an estoppel, by an acceptance given by Littleton, is the case of a feoffment without any writing accompanying it—a case that could not arise at the present time, owing to the statute of frauds. There are, however, numerous cases of this sort of an estoppel, for there is no rule more clearly settled or more firmly established, than that a man shall not be permitted, during his possession or occupation of premises, to dispute the title of his landlord. The *estoppel, by payment* of rent is not so strong as that by acceptance of the tenancy, for a person who has paid rent is allowed to show that he did so in consequence of mistake or misrepresentation. Payment of rent, under a distress, is not a conclusive admission of title in the distrainor, but may be rebutted by showing that he never had any title. If the tenant cannot show some reason to the contrary, the payment of rent estops him from disputing the title of the landlord. This principle of estoppel naturally arises from the peculiarity of the relation of landlord and tenant, to which, also, other branches of the law of estoppel apply. The *estoppel in pais* which prevents the tenant from denying the landlord's title, depends upon the tenant's obligation, express or implied, that he will at some time, or in some event, surrender the possession, and it arises out of the injustice of permitting one who has obtained possession of land, by promising to pay an equivalent in rent, to use the advantage thus acquired as a means of withholding both the rent and the land, and would be of comparatively little value if limited to the landlord, and unsusceptible of being enforced by those claiming under him as heirs or purchasers. While the foundation of estoppels, upon the old adage, "that the truth is not to be spoken at all times," is a harsh one, and is never to be applied except where, to allow the truth to be told, would consummate a wrong to the one party, or enable the other to secure an unfair advantage ; as between landlord and tenant, the estop-

¹ Com. Dig. Lit. Estoppel, A. 3 ; Coke Lit. 352.

pel is designed as a shield for the protection of the former, but not as a sword for the destruction of the latter. The lessee is, therefore, estopped from denying the lessor's title, and setting up such want of title as an answer to an action for the rent; for the law will not suffer a tenant to abuse a possession gained by the act and confidence of the landlord, and then turn it to the injury of the latter.

SEC. 349. While a tenant cannot dispute his landlord's title, he is allowed to show that it has expired, because in a case of this kind he does not dispute it, but confesses and avoids it by matter *ex post facto*. He may also dispute its validity at any time previous to his own tenancy, so as to avoid an assurance made by the landlord before its commencement.¹ If a tenant consents to give up possession to a party claiming by title adverse to his own landlord, that party is estopped, as the tenant would have been, from disputing the landlord's title.² A person who depends in ejectment, as a landlord, is bound by an estoppel of this sort existing against a tenant in possession.³

SEC. 350. Where premises are let by the agent of an unnamed landlord, as such the tenant who has gone into possession is estopped from disputing the title of the unnamed landlord, when disclosed.⁴ The estoppel is applicable to and includes a licensee who is prevented from disputing the title of the person who licensed him.⁵ In this case the defendant asked leave of the party to get vegetables in the garden, having thus obtained an entrance took possession of the house and claimed title held that she was estopped. The party must first give up possession to the party by whom he was let in, and then if he or she or any one claiming by him has a title *aliunde*; that title can be tried by ejectment. This rule applies also to the case of a person coming in by permission as a lodger or servant,⁶ and a landlord may by his acts be

¹ Doe d Oliver v. Powell, 1 A. & E. 531.

² Doe d Bullen v. Mills, 2 B. & A. 17.

³ Doe v. Lady Smythe, 4 M. & S. 357; Doe v. Mizem, 2 M. & R. 56; Veale v. Warren, 1 Wm. Saund. 328.

⁴ Flemming v. Gooding, 10 Bing. 549.

⁵ Doe d Johnson v. Baytop, 3 A. & E. 188.

⁶ Garhart v. Finney, 40 Mo. 340.

estopped from setting up a breach of the conditions of the lease and demanding a forfeiture.¹

SEC. 351. The ordinary method of establishing a privity in estate, is by proof of the payment of rent, which is always *prima facie* evidence of the title of the landlord and is conclusive against the party paying and all others claiming under or in privity with him. If a privity in estate has subsisted between the parties, proof of title is unnecessary; for a party is not allowed to dispute the original title of him by whom he has been let into possession. So a lessee of a close in severalty demised to him by one of several tenants in common, cannot set up an adverse title in bar of an action by his lessor.² This applies to the case of a tenant, by wrong against the owner and to one holding over after the expiration of the lease, though the landlord's title was acquired by wrong, or only an equitable title, and when the relation of landlord and tenant is once established by express act of the parties, it attaches to all who may succeed to the possession through or under the tenant, whether immediately or remotely; the succeeding tenant being as much affected by the acts and admissions of his predecessor in regard to title as if they were his own. So a purchaser at a sheriff's sale is privy to the debtor's title, and is therefore equally estopped with him. An agreement to purchase lands if made deliberately, estops the purchaser from denying the title of the purchasee, as a recovery cannot be had in ejectment without proof of title, and that it may be defeated by proving an outstanding title in a third person. The result of allowing a tenant to deny the right of a landlord, in an ejectment for the land, would be to take the estate from the landlord and confer it on the tenant whenever there is a defect either in the title itself or the proof brought forward to sustain it. The law therefore does not permit or tolerate a course which is equally inconsistent with public policy and private faith, and would prevent men from letting their property even when they were unable to use it themselves; when, possession is obtained under a lease, the lessee is estopped from

¹ Doe d Willis v. Brichmore, 9 A. & E. 662.

² Doe v. Mitchell B. & B. 11; Jackson v. Creal, 13 John. 116.

keeping the land in violation of the agreement under which it was acquired.¹

SEC. 352. An estoppel *in pais* is called into existence by the acceptance of possession, under a deed, only when the deed is accepted in one of those relations which imply an obligation to return or surrender possession, and a sort of allegiance to him under whom or in subjection to whose interest it is held, such as is the relation of landlord and tenant, trustee and *cestui qui trust*, mortgagor and mortgagee.² In the case of landlord and tenant, it exists only when possession has been received under the deed, and expires or is discontinued when the landlord's title has determined or the tenant has been actually or constructively evicted. It is an extension of an estoppel beyond its ordinary limit to apply it to the case of grantor and grantee, where the grantee claiming by virtue of his own purchased right, and having paid the money for his title, is under no obligation whatever to his grantor, or to the widow claiming by virtue of his grantor's seizin in regard to it. The court held,³ that when the grantor has no title and the grant is made by bargain and sale, or other similar conveyance, the dictum of Lord Coke that an estoppel may grow out of the acceptance of an estate is inapplicable, for the reason that under such circumstances there is no estate to vest in or be accepted by the grantee. In England, where this dictum of Coke's is applicable, there can be but one title, at any one time, to the same tract of land. Adverse possession under a claim of right is not regarded there as an estate, and the notion of two distinct and hostile titles running side by side, which was once familiar to the professional mind, has little or no place in the present system of conveying. A feoffment might create an estate in the feoffee, where none exists in the feoffor, that would endure until defeated by the entry of the rightful owner and be made the subject of a series of transfers, each placing the assignor

¹ Doe v. Smythe, 4 M. & S. 544.; Ingraham v. Baldwin, 5 N. Y. 45.

² Willison v. Watson, 3 Peters, 47; Watkins v. Holman, 16 Pet. 53; Blight's Lessee v. Rochester, 7 Wheat. 548.

³ Sparrow v. Kingman, 1 N. Y. 242.

in privity with his predecessor's, and rendering them liable to be summoned to defend his title.

SEC. 353. While a deed, by a grantor without title, may give rise to an estoppel, it cannot confer an estate capable of being transferred to third persons, even when the result is to deprive the assignee of the means of obtaining redress for the failure of the grant. Thus, no suit can be maintained on the covenants for title contained in a deed from a mortgagor, because the equitable ownership cannot supply the place of the legal title which is outstanding in the mortgage, and a like result follows when there is a failure or want of title from any other cause.' In this country, a conveyance attended and fortified by possession confers a title, which, however weak absolutely, will be good relatively to the parties and those claiming under them, until brought into conflict with some superior right. The assignees of the grantee are subject to the estoppel of the grant, and may sue and be sued upon covenants contained in it, and the various mesne conveyances by which the estate has been transferred, and this is equally applicable in a case where the action is founded on a breach of warranty occasioned by the entry of a third person, under a paramount title, which is set forth in the declaration; the presumption being that an estate passed to the grantee, which, however defective, were sufficient to prevent the covenants in the deed from being in gross and enable them to run to subsequent purchasers. Whether an estoppel arises where a grantor has not a good title to convey, is a mixed question of law and fact, depending on the circumstances of the case in which it arises.²

SEC. 354. Those who derive title, by descent or purchase, from the same source are estopped from showing that either the right which they have in common, is defective or that there is a paramount title, outstanding in a third person. This is not the result of what is properly called an estoppel but it is on the principle that as between two persons claiming under the same vendor, preference should be given to

¹ Mayor of Carlisle v. Blamire, 8 East, 487.

² La Crosse & Milwaukee R. R. Co. v. Seger, 4 Wis. 268.

him who is first in point of time whether the vendor had or had not good title to the premises conveyed. Thus if A. grant and convey land to C. that he has previously conveyed to B., C. will stand *prima facie* in the same position with A. and is estopped from denying the validity of the conveyance to B. It is the duty of every vendor who sells land that he owns or possesses, to give the grantee possession if nothing more; and every one who comes in or holds under him, as his wife, tenant, or grantee, will be bound by the same obligation, unless he can show that not only the grantor's title was bad; but that he held or has acquired a better one.¹ A widow cannot rely on her husband's want of title as a reason for keeping his heirs or assigns out of possession.² Nor an heir or purchaser deny the seizin of the vendor or ancestor under whom he claims in an action brought for the recovery of dower by the widow.³ But the rule that parties who claim under or by virtue of the same right shall not dispute the title, or enter into a controversy as to its merits, is only applicable as long as they claim under it, and ceases to apply when either of them obtains a paramount title from another source. There can be no reason, and in fact there is none, why a vendee who has had the misfortune to purchase from a vendor who had no title to convey, should not protect his possession by obtaining a grant or lease from the true owner; it would be certainly a harsh doctrine that would compel a man to lose the benefit of a good title by accepting a conveyance from one which turns out to be bad. For this reason an estoppel created by a community of title extends, as a general thing, only so far as the title is in fact common, and the mere fact that both parties took title from the same vendor, does not estop either of them from disclaiming the right thus derived and relying on a paramount title.

SEC. 355. Possession may, notwithstanding the observations made in the previous section, be acquired under cir-

¹ Blakeny v. Ferguson, 20 Ark. 547.

² Grandy v. Bailey, 13 Ired. 221.

³ Blakely v. Ferguson, 20 Cush. 547; Griffith v. Griffith, 5 Harrington, 5; Williams v. Bennett, 4 Ired. 122; Ward v. McIntosh, 12 Ohio S. 234; Wedge v. Moore, 6 Cush. 8.

cumstances which estops the right to rely on a paramount title as a reason why it should not be restored to the person from whom it was derived, and when this is the case, the estoppel extends beyond the parties, and may be enforced by or against their heirs or assigns. A tenant cannot set up a deed from a third person as a defence to an action brought on the lease, or for the recovery of the land by the lessor, or those claiming under him as purchasers, and upon the same grounds, a man's wife or children cannot use the possession they have derived from him as a means of defeating his grantee.

SEC. 356. A tenant cannot deny his landlord's title. This rule of estoppel is based on equitable, rather than on legal grounds. It did not exist at common law, unless the deed was by indenture, and executed by the tenant when the estoppel arose from the seal, and not from the tenancy. A tenant who makes an agreement with his landlord for a limited period, thereby acknowledging his right to the premises, is estopped from disputing the landlord's title, under an outstanding title, held by himself for a longer period, of which the landlord had no notice.

SEC. 357. It was an early rule of feudal policy, that the tenant should not be permitted to deny the title of the lord from whom he had received investiture, and whose liege man he had become ; but as long as that relation existed, the title of the lord was conclusively presumed against the tenant, to be perfect and valid. And though the feudal reasons of the rule have long since ceased, yet other reasons of public policy have arisen in their place, thereby preserving the rule in its original vigor. A tenant therefore by indenture, is not permitted at this day, to deny the title of his lessor, while the relation thus created subsists. "It has been ruled often," said Dampier, J., in the year 1815, that neither the tenant, nor any one claiming by him, can dispute the landlord's title. This I believe to have been the rule for the last twenty-five years, and I remember was so laid down by Buller, J., upon the western circuit. This rule then having no foundation in the old common law, it has been well suggested that "its origin must be sought in

the general principle, that where a party has kept or obtained the possession of land which he otherwise would not have had, by means of an agreement or understanding, he shall be estopped from setting forth anything in opposition to its terms or intent in a suit brought in order to recover such possession. This was of necessity, called into being by that feature of the action of ejectment which requires an absolute possessory title in the plaintiff, and makes in its absence, the mere fact of possession decisive in favor of the defendant. It never could be pretended that in general, the acceptance by the grantee of a conveyance of an estate from the grantor, precluded the former from denying the title of the latter, since if such were the rule, all the covenants for title would be at once useless, as the essence of a breach of these covenants is the existence of a title or a possession paramount to that of the grantor.

SEC. 358. Though the origin of this rule is involved in some obscurity, it is traceable to feudal tenures, where the tenant was bound to the landlord by ties not much less sacred than those of allegiance itself.¹ In this country this doctrine is recognized as a branch of the law of landlord and tenant.² The policy of the law will not allow a tenant, under such circumstances, to be guilty of a breach of good faith in denying a title, by acknowledging and acting under which, he originally obtained, and has been permitted to hold possession of the premises.³ Thus where a lessee, whose duty it was to pay the taxes assessed upon the premises, suffered the same to be sold for default of payment, and purchase the same at a public sale, can not set up a title thus acquired, against his landlord.⁴ This would not be the case if there were no fault on his part in not making payment of the taxes.⁵ Neither will it allow him to complain

¹ Smith. Land and Ten. 234.

² Blight's Lessee v. Rochester, 7 Wheat, 548.

³ Cook v. Loxley, 5 T. R. 4; Balls v. Westwood, 2 Camp. 11; 2 Dane, Abr. 443; Hodges v. Shields, 18 B. Mon. 830; Miller v. McBrier, 14 S. & R. 382; Brown v. Dysinger, 1 Rawle, 408; Ball v. Lively, 2 J. J. Marsh, 181; Delzell v. Odell, 3 Hill, 219; Ingraham v. Baldwin, 5 N. Y. 47.

⁴ Haskell v. Putnam, 42 Me. 244.

⁵ Bettison v. Budd, 17 Ark. 516.

of a want of title in his lessor, so long as he is himself undisturbed.¹

SEC. 359. All that the law requires is, that during the time which the tenant actually holds by permission of the landlord, the landlord's title shall not be disputed. In technical phrase, the tenant shall not be allowed to plead, to his landlord's action, *nōl habuit in tenementis*,² and this applies, though the tenant holds under a parol demise from a tenant at will; he is estopped to deny his lessor's title.³ This is equally applicable between the lessee and the assignee of his lessor.⁴

SEC. 360. A tenant cannot set up a title adverse to the lessor's, either in himself or a third party, *inconsistent with the lessor's right to grant the original lease*,⁵ or impeach the validity of the landlord's title at the time of the commencement of the demise,⁶ even though this title may have been gained during the continuance of the lease,⁷ by purchase from a third person,⁸ or the lessee was in possession when he accepted the lease.⁹ Nor is the tenant any more at liberty to deny the title of the heir, where the lessor dies during the term, than to deny the title of the lessor himself;¹⁰ and it applies to all persons to whom the title has come from the landlord.¹¹ But this estoppel is not without its limitation. After the expiration of the lease the lessee is no longer estopped by it to assert any right which he may have, though

¹ Ankeny v. Pierce, Breese, 202; George v. Putney, 4 Cush. 351; Vance v. Johnson, 10 Humph. 214.

² Boston v. Burney, 11 Pick. 8; People v. Stiner, 45 Barb. 56.

³ Coburn v. Palmer, 8 Cush. 124.

⁴ Tuttle v. Reynolds, 1 Vt. 80; Funk's Lessee v. Kincaid, 5 Md. 404.

⁵ Reed v. Shepley, 6 Verm. 602; Lyme v. Saunders, 4 Strobb. 196; Chambers v. Peak, 6 Dana, 426; Plumer v. Plumer, 30 N. H. 558; Hood v. Mather, 2 A. K. Marsh, 553; Jackson v. Whedon, 15 N. Y. 141; Hardistry v. Glenn, 32 Ill. 65; Balls v. Westwood, 2 Camp. 11.

⁶ Delaney v. Fox, 2 C. B. N. S. 777; Despard v. Wallbridge, 15 N. Y. 378.

⁷ Galloway v. Ogle, 2 Binn. 468; Sharpe v. Kelley, 5 Denio, 431; Wilson v. Smith, 5 Yerg. 379; Drane v. Gregory, 3 B. Mon. 619; Elliot v. Smith, 23 Penn. 131; Clemm v. Wilcox, 15 Ark. 102.

⁸ Marley v. Rodgers, 5 Yerg. 217.

⁹ McConnell v. Bowdry, 4 Mon. 392.

¹⁰ Blantin v. Whitaker, 11 Humph. 313.

¹¹ Russell v. Allard, 18 N. H. 225.

it be of such a character that he could not do so while the relation of landlord and tenant continued.¹ But where the lessee is induced to accept possession from his lessor by fraud or mistake,² where he is deprived of the possession derived from his lessor, by some one who has a paramount title, or has yielded the same, when claimed, to one having such title, without having procured this to be done, and without violating good faith;³ or if the lessor's title has expired or been extinguished since the lessee's term began, and the lessee has an independent right to the possession, the latter may avail himself of it, showing thereby that the lease under which he held had, in fact, been determined;⁴ or after eviction by one having a paramount title, he is excused from paying rent.⁵ But if a tenant yield to a writ of possession, which does not run against him or his landlord, and then attorn to the demandant in such writ, he cannot set up this in defence against his landlord.⁶ If he purchases a better title than that of his lessor, he must surrender possession to his lessor before he seeks to avail himself of his new title against his landlord.⁷

SEC. 361. But still, if a tenant enters under his lease, and continues to occupy without what would be tantamount to an eviction, he cannot, in an action, to recover the rent, show either that his lessor had no title when he made his lease, or that his title has determined since the making of his lease.⁸ Nor can he set up in defense to an action for rent that the lessor holds under a grant which is void

¹ Child v. Chappel, 8 N. Y. 246; Jackson v. Rowland, 6 Wend. 609.

² Miller v. Bonsaden, 9 Ala. 317; Jackson v. Spear, 7 Wend. 401; Thacher v. Society, &c. 20 Penn. 60; Tison v. Yawn, 15 Ga. 491; Alderson v. Miller, 15 Gratt. 279.

³ Sims v. Salters, 3 Denio, 214; Whalin v. White, 25 N. Y. 465; Evertsen v. Sawyer, 2 Wend. 507.

⁴ Strack v. Seaton, 26 Mann. & R. 729; Jackson v. Rowland, 6 Wend. 666; Tilghman v. Little, 13 Ill. 241; Wild's Lessee v. Russell, 10 Gratt. 415; Hopercraft v. Keys, 9 Bing. 613; England v. Slade, 4 T. R. 682.

⁵ Marsh. v. Butterworth, 4 Mich. 475.

⁶ Caldenwood v. Pyser, 31 Cal. 337.

⁷ Hodges v. Shields, 18 B. Mon. 822.

⁸ Lyne v. Sanders, 4 Strobb. 196; Sneed v. Jenkins, 8 Ired. 27; Den v. Ashmore, 2 N. T. 261; Morse v. Roberts, 2 Cal. 515; Naglee v. Ingersoll, 7 Penn. S. 185.

as against the creditors of his grantor, because made to defraud them.¹ The relation of landlord and tenant must be dissolved, and the possession restored, or an equivalent effected by the tenant, before he can set up another title.² The rule which estops the tenant from relying on the landlord's want of title as a defense to an action brought for the recovery of the rent, is founded on special and limited causes. While the tenant is estopped from denying the title of his landlord in real or possessory actions brought for the recovery of the land, the estoppel is manifestly equitable and not legal, and it had not become an absolute or well settled rule until about the end of the last century, although it was introduced at a much earlier period. The principle of estoppel between lessor and lessee is well established and ought to be maintained. The title of the lessee is in fact the title of the lessor. He comes in by virtue of it, holds by virtue of it, and rests upon it to maintain and justify his possession. It is a part of the very essence of the contract under which he claims that the paramount ownership of the lessor shall be acknowledged during the continuance of the lease, and possession shall be surrendered at the expiration. He cannot be allowed to controvert the title of the lessor without disparaging his own, and he cannot set up the title of another without violating the contract by which he obtains and holds possession, and breaking that faith which he has pledged and the obligation which is still continuing in full operation.³ The estoppel is not confined to the original parties to the lease, but extends to all who come in under the tenant, or take by descent or purchase from the landlord, and applies in actions brought for the recovery of rent, as well as in those which are instituted to obtain possession of the premises after the end or other determination of the term, and will be enforced in a summary proceeding for unlawful detainer, as well as in a more formal action, and operates where the defect of the landlord's title appears from

¹ *McCurdy v. Smith*, 35 Penn. 198.

² *Porter v. Mayfield*, 21 Penn. 264; *McGinnis v. Porter*, 20 Penn. 89; *Thompson v. Clark*, 7 Penn. 62; *Brown v. Keller*, 32 Ill. 159; *Russell v. Erwin*, 38 Ala. 59.

³ *Blight's Lessee v. Rochester*, 7 Wheat. 555.

his own evidence,¹ because the injustice lies in taking advantage of the defect and in not pointing out or proving its existence.

SEC. 362. If the demise is by indenture, the tenant is positively estopped to plead *nil habuit*, &c., even though the lessee may have hired and enjoyed only what was clearly his own land, as would be the case if a disseizor were to demise to his disseizor by indenture.² By accepting a lease and becoming a tenant, he admits the title of his landlord, and consequently precludes himself from disputing it.³ Such estoppel only continues during the term of the hiring; after that the lessee may set up his own title against his lessor.⁴ Where the lessor is not himself in possession, the lessee is not estopped, by a written agreement to hold for a certain time and pay rent, to plead *nil habuit* to an action for rent,⁵ and the rule is equally imperative in actions for use and occupation where the demise is by parol, and applies as well after, as during the term, and where the tenant holds over after the expiration of the term.⁶ Though if there is a written lease the lessor cannot recover for use and occupation, and such would be the case at the common law if the lease were under seal,⁷ so, if a tenant under a lease were to convey the estate in fee to a third party, he would have no better right to contest the title of the lessor, than the lessee himself.⁸ Thus the doctrine is fully stated in one case: "The

¹ Gray v. Johnson, 14 N. H. 414; Russell v. Fabian, 27 N. H. 527.

² Kemp v. Goodall, 2 Ld. Raym. 1154; Wilkins v. Wingate, 6 T. R. 62; Fletcher v. M'Farlane, 12 Mass. 45; Wilson v. Townsend, 2 Ves. 693; Miller v. Bonadon, 9 Ala. 317; Vernam v. Smith, 15 N. Y. 327; Co. Lit. 476.

³ Paige v. Kinsman, 43 N. H. 331; Atwood v. Mansfield, 33 Ill. 458.

⁴ Accidental Death Ins. Co. v. Mackenzie, 10 C. B. N. S. 870; Paige v. Kinsman, 43 N. H. 331; Jones' case, Moore, 181; Russell v. Fabian, 27 N. H. 529; Willison v. Watkins, 3 Peters, 48.

⁵ Chatel v. Pound, 1 Ld. Raym. 746.

⁶ Binney v. Chapman, 5 Pick. 124; Shelton v. Doe, 6 Ala. 230; Jackson v. Stiles, 1 Cow. 575; Falkner v. Beers, 2 Dong. 117; Vernam v. Smith, 15 N. Y. 327; Lewis v. Willis, 1 Wils. 314; Phipps v. Sculthorpe, 1 B. and Ald. 50; Fleming v. Gooding, 10 Bing. 549.

⁷ Warren v. Ferdinand, 9 Allen, 357.

⁸ Phillips v. Bothwell, 4 Bibb. 33; Den v. Gustin, 7 Halst. 42; Twily v. Rodgers, 1 A. K. Marsh, 215.

same estoppel which prevents a tenant from disputing his landlord's title, extends to all persons who enter upon premises under a contract for a lease, and to all persons who by purchase, fraud, or otherwise obtain possession from such tenant.¹ But if one, not knowing that the tenant holds a lease, purchases the estate by an absolute deed from the tenant, who has an apparent legal title other than his lease, such purchaser may contest the title of the lessor.²

SEC. 363. A person defending as landlord is bound by the same estoppel as the tenant himself, and a party who gets possession of premises from the lessor of the plaintiff by any fraud or trick upon him, cannot set up his own title, or a title in a third person, in answer to the action.³ A party who defends as landlord is estopped from objecting that the occupiers of the premises, who have suffered judgment to go by default, are tenants to the lessor, and have not received notice to quit from him.⁴ The tenant is estopped, by his lease or occupation, from disputing the title of his lessor, or from setting up an adverse title of another, acquired by him since the making of the lease, either in pleading or in evidence; and a third person, having a title to the land paramount to that of the lessor, cannot recover rent until he has actually, or made, an effectual claim under his title. An action for rent does not lie in favor of a stranger, or by one of two litigating parties claiming the land. An action of this kind does not depend upon the validity of the plaintiff's title, but on a contract between the parties, express or implied. This applies not only to a tenancy, but to any occupation by permission of another, as an action for rent, for recovery of the premises on the ground of forfeiture or otherwise, or for mesne profits, and the estoppel applies not only to the lessee or lessor, but to any

¹ *Rose v. Davis*, 11 Cal. 135; *Russell v. Erwin*, 38 Ala. 50.

² *Thompson v. Clark*, 7 Penn. St. 62; *Cooper v. Smith*, 8 Watts, 536; *Jackson v. Davis*, 5 Cow. 129.

³ *Doe v. Smythe*, 4 Maule. & Selw. R. 447; *Doe v. Mizzen*, 2 Moody & Robinson's R. 56; *Doe v. Sutherland*, 4 Adolph. & Ell. R. 784; *Doe v. Baytop*, 3 ib. 188; *Doe v. Mills*, 2 ib. 17.

⁴ *Doe v. Creed*, 5 Bing R. 327; *Francis v. Doe*, 4 Mees & Wels. R. 331; *Doe v. Skirrow*, 7 Adolph. & Ell. R. 157; *Doe v. Birchmore*, 9 ib. 662; *Doe v. Fuller*, 1 Tyr. & Granger's R. 17.

one claiming under him, or in continuation of his estate, as an assignee, sub-lessee, purchaser, wife of a deceased tenant, an assignee, or the heir of the lessor, or between heir and administrator;¹ and even if a man take a lease of his own land, or land of which he has possession, the estoppel applies, and he is concluded; and while a tenant cannot dispute his landlord's title at law, equity affords him no relief.² But where the landlord waives the estoppel, it does not apply, nor does it if the tenancy has ceased. The estoppel is created by the making of the lease, and when that determines, the estoppel ends.

SEC. 364. When a person has been let into possession by the lessor, or those under whom he claims, the lessee is estopped from disputing the title. The claimant may not, in point of fact, own the land, or have any legal title to it, and yet as against the defendant, the law assumes that he has a right to the disputed property.³ That a person coming into the possession of lands, under the agreement or license of another, cannot be permitted to deny the title of the latter is universal. Even if he had a valid title at the time, he is deemed to have waived it, and as between the parties to have admitted title in the person under whom he entered. For instance, one making a contract to buy land, and taking possession under it, though strictly the relation of the landlord and tenant, is not thus created, yet the vendee, in ejectment by the vendor against him, is absolutely estopped from either showing title in himself, or setting up an outstanding title in another. The agreement to purchase, is an acknowledgment of the title of the vendor, and hence the vendee is not permitted to set up an outstanding title, when called upon to respond in the action of ejectment.⁴ A claim of title, which cannot be set up by a person while in possession, cannot be set up by another person who comes

¹ *Tondro v. Cushman*, 5 Wis. 279.

² *Payton v. Stith*, 1 Peters, 486.

³ *Sullivan v. Stradling*, 2 Wils. R. 208; *Blake v. Foster*, 8 Term. R. 487; *Hodson v. Sharpe*, 10 East's R. 355; *Phillips v. Pearce*, 5 Barn. & Cres. R. 433; *Baker v. Mellish*, 10 Ves. jr. R. 544; *Gravenor v. Woodhouse*, 1 Bing. R. 38.

⁴ *Jackson v. Ayres*, 14 Johns. R. 224.

into possession under him. This applies to the case of a person who comes into possession either as an intruder, or under one who has so purchased, and in either case he is estopped from questioning the plaintiff's right of possession.¹ A defendant will not be permitted to show title in another, for the plaintiff comes into exactly such estate as the debtor had; and if it was a tenancy, the plaintiff will be a tenant also, and estopped in a suit by the landlord from disputing his right. A mortgagee or direct purchaser from a tenant, or one who buys his right at a sheriff's sale, assumes his relation to the landlord with all its legal consequences, and is as much estopped from denying the tenancy as the original tenant.² Estoppels of this kind arise also when there is an acceptance of a lease, notwithstanding a failure to enter upon, or a withdrawal from the premises,³ and endures after the expiration of the term of the tenant, who still remains in the occupation of the land.⁴ As these principles apply with the same force, whether the estate demised is of freehold or for years, a grantee in fee, by deed indented, cannot rely on a defect in the grantor's title, as a reason for refusing to pay rent, especially when he has gone into possession.⁵

SEC. 365. In actions where suit is brought for the recovery of the land. This estoppel is specially an equitable one, as distinguished from a legal estoppel, and is applicable where the tenant has obtained possession on the faith of the lease, or when his acceptance of the lease has prevented the landlord from gaining possession, which he was entitled to have and which he would otherwise have acquired,⁶ but not where a tenant already in possession agrees to hold of another, under a mistaken impression that he has a good title;⁷ nor in any case where the tenant can retain possession

¹ Jackson v. Harder, 4 Johns. R. 202; Jackson v. Bard, Ib. 230; Jackson v. Walker, 7 Cow. R. 637.

² Wilson v. Watkins, 3 Peters, 43; Lockwood v. Walker, 3 McLean, 431.

³ Vernam v. Smith, 15 N. Y. 329.

⁴ Delany v. Fox, 2 C. B. N. S. 168; Turner v. Bradner, 18 B. Monroe, 825.

⁵ Naglee v. Ingersoll, 7 Penn. 185; Hipple v. Brice, 28 Penn. 406.

⁶ Cornish v. Woodman, 8 B. & C. 471; Hockenbury v. Snider, 2 W. & S. 240.

⁷ Ingraham v. Baldwin, 5 N. Y. 45; Swift v. Dean, 11 Verm. 325.

without controverting anything which he expressly or impliedly admitted when he took it ;¹ nor when the assent of the tenant is procured through fraud or misrepresentation on the part of the landlord. And it has been held that the mere fact of inducing a tenant in actual possession, although without title, to accept a lease from one who has neither title or possession, and thus acknowledge a right which has no existence, carries with it such an implication of fraud or undue influence as will prevent the lease from operating as an estoppel in favor of the lessor.² A tenant is estopped from contesting the validity of the title at the time when the lease was made and possession given, not from showing that the right which the landlord then had was defeasible or limited in its nature and has since expired or been defeated. Proof that the premises were sold under a judgment against the lessor and bought in by the tenant or by a third person, to whom he has attorned, in order to avoid being evicted ; or that the lessee has attorned or paid rent to a mortgagee under the pressure of a demand from the latter, will be a good defense in an action brought to enforce the covenants in the lease or to recover possession, for the reason that the tenant is allowed to acquiesce in what he cannot resist, and to attorn in the first instance in place of going out of possession, and then returning under a new lease ;³ and, also, applies where the land is sold for taxes, and the tenant is compelled to become the purchaser in order to avoid eviction,⁴ unless the circumstances were such that the fault is as much his as the landlord's.⁵

SEC. 366. A lessee may show that his lessor's title has expired, but he cannot show that it never existed. The expulsion of the tenant by a paramount title will put an end to the estoppel. The estoppel is absolute as long as the tenant remains in possession, even when he has attorned in good faith to the holder of the adverse title in order to

¹ Gregory v. Dorge, 5 Bing. 474; Clangle v. McKenzie, 4 M. & G. 472.

² Hockenbury v. Snider, 2 W. & S. 240; Hill v. Bermer, 1 Penn. 402.

³ Evans v. Elliott, 9 A. & E. 342; Mayor v. White, 15 M. & W. 571; Watson v. Lane, 11 Exch. 769.

⁴ Bettison v. Budd, 17 Ark. 546.

⁵ Haskell v. Putnam, 42 Maine. 342.

avoid an eviction,¹ unless the latter has previously obtained a verdict and judgment in ejectment, or other real or possessory action brought for the recovery of the premises.² A lessee cannot deny the title of his lessor until he is discharged from the estoppel arising out of his lease, and possession by yielding up possession to his lessor.³ He cannot enable himself to resist his landlord, by merely leaving the premises, and then before the landlord gets in, going back under some other possession or claim of title, for that is plainly incompatible with the lessor's right to have back the possession which the tenant agreed to restore.⁴ It is not necessary to the operation of an estoppel of this nature, that the tenant should have actual possession of the premises, if he might have had possession but for his own neglect or fault. Proof that the lessor had no title, and that the lessee refrained from entering, consequently, will not be a defense to a suit for rent, unless it is shown that the premises were held adversely and by title paramount, and that the lessee could not have entered without committing a trespass.⁵

SEC. 367. But when a landlord has neither title nor possession when the lease is made, all the elements necessary to constitute an estoppel are wanting, and the tenant cannot be made liable in any form of action after a tenant has surrendered possession to his landlord, and has abandoned the premises to the lessor, he may re-enter under a paramount title derived from a third person, although it is before the period of time originally fixed for the expiration of the lease.⁶ But in order to do so, the surrender must be real, in order to be effectual; it will not be sufficient if the party goes out of possession unless the other has due notice and full opportunity to come in.⁷

¹ *Freeman v. Heath*, 13 Iredell, 498; *Grandy v. Bailey*, Id. 211.

² *Chambers v. Peak*, 6 Dana, 426.

³ *Smart v. Smith*, 2 Dev. 258; *Freeman v. Heath*, 13 Ired. 498.

⁴ *Jordan v. Marsh*, 9 Ired. 254.

⁵ *Howard v. Murphy*, 23 Penn. 173; *Vernam v. Smith*, 15 N. Y. 329.

⁶ *Turner v. Bradner*, 18 B. Mon. 285.

⁷ *Green v. Munson*, 9 Vt. 370; *Boyer v. Smith*, 3 Watts 419; *Bannon v. Bannon*, 34 Penn. 263; *Freeman v. Heath*, 13 Ired. 498; *Graham v. Moore* 4 Serg. & Rawle, 467.

SEC. 368. A person who takes and retains the peaceable possession of mortgaged premises, by direction of the mortgagee, without any agreement to pay rent, is a tenant at will, from year to year of such mortgagee, and cannot be ejected by the mortgagor or his assigns, so long as the mortgage remains unsatisfied.¹ But a lessee of a mortgagor is not estopped in an action of ejectment, brought against him by the mortgagor, from showing, to protect his possession that he has become the assignee of the mortgage.²

SEC. 369. If a person makes a parol gift of land to an infant, and the mother enters into possession under an agreement to hold it for her son. The relation of landlord and tenant is not created, but she is estopped from disputing her son's title.³ An infant will not be estopped to deny the title of his landlord, though he has admitted that he held under him, and has given his note for the rent. A contract by which a tenant is induced to desert his landlord is corrupt and void, and the person to whom he has attorned cannot maintain an action upon it. And if an adverse claimant tampers with a tenant, and obtains possession either by his consent or a collusive recovery, he is estopped to deny the landlord's title, and the tenant is likewise estopped, though he has surrendered to a stranger.⁴ A defendant in an ejectment suit, cannot set up an adverse possession after having acknowledged a tenancy.⁵ A party who has taken title to one undivided half of the premises, from a trustee and occupied the other half as tenant, is estopped to deny the validity of the title to such other half of the premises in the trustee's grantee.⁶ Upon the termination of a lease made by M., as agent, he brought ejectment to recover possession, the tenant was estopped from showing that M.'s agency was revoked.⁷ An admission that a title exists, implies that it

¹ *Hennessey v. Farren*, 20 Wis. 42.

² *Niles v. Rainsford*, 1 Mich. 338.

³ *Russell v. Erwin*, 38 Ala. 44.

⁴ *Morgan v. Ballard*, 1 Mar. 558; *Steward v. Roderick*, 4 W. & S. 188.

⁵ *Hoag v. Hoag*, 35 N. Y. 467.

⁶ *Clark v. Crego*, 47 Barb. 599.

⁷ *Holt v. Martin*, 51 Penn. 499.

has all the ordinary incidents of an estate in land and may be assigned.¹

SEC. 370. If a lessor sells or transfers his legal estate and interest in the demised premises to a third party, and the lessee receives notice of the transfer, and is required to pay his rent to the transferee, and refuses, he is liable to an action for use and occupation at the suit of the latter. The defendant may show that the plaintiff's interest in the premises has expired, or has been transferred to some third party, but he is estopped from denying the lessor's title to grant the property to be enjoyed and cannot show that he has only the equitable estate, or that he is entitled only as co-executor with others who do not join in the action.

SEC. 371. One tenant in common of lands may estop himself by a grant of an easement upon such lands, but he cannot thereby estop his co-tenants; nor will they become estopped by acquiring his interest in the lands.² When the owners or occupiers of land hold such a relative position as to make it the duty of each to protect the title of the other, any purchase that may be made of an adverse or outstanding title by one will enure in equity to the benefit of all,³ this principle which is well settled with regard to joint tenants and coparceners should be sufficiently broad to entitle a landlord to require a tenant who has bought at a sale for taxes or other proceeding of the same nature to reconvey on receiving the amount expended. This is the rule where the sale is occasioned by the default of the tenant in not paying the taxes as he had stipulated in the lease.⁴ And after the expiration of the lease, a lessee who suffers the demised premises to be sold for taxes or assessments which by the terms of the lease he was bound to pay, is estopped from setting up a tax deed to himself as assignee of the certificates of such against his lessor, although not issued until after the termination of the tenancy, but such lessor may, in an action for that purpose compel the grantee of such deed to quit-claim the premises,

¹ Cuthbertson v. Irving, 4 Hurl. & N. 746; 6 Ib. 135.

² Mabie v. Matteson, 17 Wis. 1.

³ Church v. Church, 25 Penn. 278; Phelan v. Kelly, 25 Wend. 508.

⁴ Haskell v. Putnam, 42 Maine, 214

or restrain him from incumbering or disposing of the same or suing for the possession thereof, and in such suit he need not prove his own title thereto.¹

SEC. 372. The estoppel between landlord and tenant stands on the same footing, and is of the same nature as that which subsists between vendor and vendee, mortgagor and mortgagee,² and grows out of the injustice of permitting a possession obtained for a specified purpose, to be withheld after that purpose has failed or been fulfilled.³ It is applicable whenever an attempt is made to retain the possession of land in violation of good faith, and to the injury of the person to whom it rightfully belongs,⁴ and arises with as much force from an entry under a license or covenant of sale, as if there had been a formal lease.⁵ A husband who entered under his wife, or a wife who was put in possession by her husband, occupies the position of a tenant, and is estopped from disputing the title of the heir,⁶ and the same estoppel applies to a son occupying under his father,⁷ and to all who are under an obligation to restore the possession which they hold, to the source from whence it was derived. A vendee in possession cannot buy in an outstanding title, and then set it up as a reason for refusing to comply with the contract of sale,⁸ or surrendering the premises to the person from whom they were derived,⁹ unless the circumstances are such as to entitle him to rescind the contract, and refuse to pay or recover back the whole of the purchase money, nor can the vendor, or those claiming under him, keep the vendee out of possession by acquiring and setting up

¹ *Shepherdson v. Elmore*, 14 Wis. 424.

² *Wilson v. Watkins*, 3 Peters, 43; *Brooker v. Walker*, 1 Vermt. 18.

³ *Dikeman v. Parish*, 6 Penn. 210; *Greeno v. Muson*, 9 Vt. 39; *Gardner v. Greene*, 5 R. I. 104; *Blight v. Rochester*, 7 Wheat, 555.

⁴ *Tindal v. Den*, 1 Zabriskie, 651; *Kelly v. Kelly*, 24 Maine, 192.

⁵ *Glynn v. George*, 20 N. H. 114; *Phelan v. Kelly*, 25 Wend. 388; *Doe v. Baytup*, 3 A. & E. 188.

⁶ *Hall v. McHuas*, 4 W. & S. 331; *Zeller v. Eckert*, 4 Howard, 289; *Brandon v. Brandon*, 34 Penn. 263; *Long v. Mast*, 1 Jones, 189.

⁷ *Blakeny v. Ferguson*, 20 Ark. 547; *Griffith v. Griffith*, 5 Harrington, 5; *Phelan v. Kelly*, 25 Wend. 388.

⁸ *Kirk v. Taylor*, 8 B. Mon. 262; *Love v. Edmonson*, 1 Ired. 152.

⁹ *Hill v. Samuel*, 31 Miss. 307; *Henderson v. Conay*, 10 S. & M. 487; *Walker v. Sedgwick*, 3 California, 398.

a title, inconsistent with that which he agreed to sell.¹ Thus, when a vendor remains in possession, after the execution of the deed, with an understanding that possession shall be surrendered at his death, his widow will be estopped from setting up an outstanding title in a third person, as a bar to an ejectment brought by the heirs of the purchaser.²

SEC. 371. As this class of estoppels are founded upon the injustice of keeping possession of the land, in violation of the implied or express understanding of the parties, they cease to exist as soon as it is surrendered,³ or taken from him by the entry of a third person under a paramount title. The efflux of the term and the surrender of the premises leaves the tenant free to contest the landlord's title even when the lease is under seal.⁴ Estoppels being limited in their application to the transactions in which they arise, they cease to exist when the purpose for which they came into being is satisfied.

SEC. 372. Equitable estoppels have an important bearing on the surrender of particular estates to those in remainder or reversion, and the consequent extinguishment of the rights and duties incident to the estates surrendered. The statute of frauds, which renders a writing necessary to the validity of a surrender, expressly except *surrenders* by operation of law. The participation of a tenant for life, or for years in any act of the remainderman or the reversioner inconsistent with the continuance of the tenancy, will enure as a surrender by operation of law and thus come within the exception of the statute, even when the act is *in pais* and the original lease by deed.⁵ Especially when the act consists in the grant of a new estate in the tenant himself, as when the lessee for life accepts a feoffment with livery from the lord or a new lease from the reversioner, or when the parties to a lease enter into an agreement which substitutes the relation

¹ Upshaw v. McBride, 10 B. Mon. 202; Grandy v. Bailey 13 Ired. 221.

² Doe v. Skirrow, 7 A. & E. 157.

³ Reed v. Shepley, 1 Vern't. 202; Camp v. Camp, 5 Cow. 291; Moshier v. Redding, 12 Me. 478; Moore v. Freeman, 1 Bushy. 95.

⁴ Wild v. Russell, 10 Gratt, 405; Stewart v. Smith, 2 Dev. 258.

⁵ Baker v. Pratt, 15 Ill. 570.

of vendor and vendee for that of landlord and tenant.¹ Where the tenant assents to a lease to a stranger and surrenders possession, which is taken by the new lessee, it estops the first tenant while it may not be regarded as a surrender of the term, from enforcing his lease to the injury of the lessor and second lessee, the other parties to the transactions.²

SEC. 373. No contract or agreement can take effect, either as a surrender by operation of law or as an estoppel, unless it has been acted upon, or wholly or partially executed. An agreement between a landlord and tenant, for a change in the tenancy, or to put an end to the lease, will not be binding as an agreement, without some new extrinsic or intrinsic consideration,³ nor operate as a surrender, unless it enures as a new or actual lease,⁴ or manifests, in some equally unmistakable way, a design to substitute a new and inconsistent relation for that which has hitherto prevailed.⁵ An agreement with a stranger for a new lease, unattended by a change of possession, will be ineffectual, although made with the assent of the tenant.⁶ The grant of a new lease is a material and indispensable ingredient, unless its place is supplied by other circumstances, because the mere entry of a third person, and even the acceptance of rent from him by the landlord, are evidence, not of the surrender of the existing term, but of its transfer or assignment, and consequently go to charge the new tenant, without discharging the original lessee from his express covenant, whatever may be the effect on those which are implied.⁷ A surrender of the estate by the lessee to his lessor will not authorize him to deny the title of his lessor, unless it is made fairly, so as to give time to the lessor to take possession; and if immediately after a surrender the tenant takes a lease of an ad-

¹ *Livingston v. Potts*, 16 Johns. 28; *Burnett v. Scribner*, 16 Barb. 621.

² *Nicoll v. Atherton*, 10 Q. B. 914; *Dawson v. Gent*, 1 H. & N. 744; *Randall v. Rich*, 11 Mass. 494; *Haseltine v. Seavey*, 16 Maine, 212.

³ *Crowly v. Witter*, 1 Exch. 318.

⁴ *Doe v. Thomas*, 6 B. & C. 288; *Doe v. Poole*, 11 Q. B. 713; *Brewer v. Dyer*, 7 Cush. 337; *Domelan v. Reid*, 3 B. & A. 899.

⁵ *Allen v. Jacques*, 21 Wend. 528; *Lamont v. Trest*, 2 H. & G. 433.

⁶ *Lawrence v. Brown*, 5 N. Y. 394; *Schieffelin v. Carpenter*, 15 Wend. 400.

⁷ *Schieffelin v. Carpenter*, 15 Wend. 400; *Preston v. McCall*, 7 Grattan, 121; *Ghegan v. Young*, 23 Penn. 18; *Shepperdson v. Elmore*, 19 Wise, 424.

verse claimant, it does not extinguish the estoppel.¹ The execution of a new lease to a stranger, with the assent of the tenant, will not operate either as a surrender of the original term or as an estoppel, unless followed by the entry of the stranger and the withdrawal of the tenant, for the reason that until the entry, the transaction is executory, and there is not sufficient matter *in pais* to make up for want of written evidence.²

SEC. 374. Both landlord and tenant may be estopped from insisting on their rights under the lease, by circumstances which fall short of a new tenancy. The delivery up of the key to the house by the tenant and the acceptance by the landlord constitutes a surrender by operation of law,³ and the landlord cannot make the tenant subsequently liable in an action for use and occupation.⁴ But to produce this result the tenant must not only deliver possession to the landlord, but the landlord must accept it in satisfaction or rescission of the lease.⁵ A lessor being entitled to re-enter when the lessee withdraws, for the purpose of taking care of the property, and preventing the intrusion of third persons, without abandoning the right to enforce the lease, and proof that the key was sent or left by the tenant and received by the landlord, does not warrant the inference that the lease was surrendered, unless it is shown that such was the object of the tenant, and that he would not give up the lease on other terms.⁶ It is not necessary that possession shall be given directly to the landlord, the abandonment of the premises under such circumstances that indicate that the tenant has no intention of returning will justify the landlord in regarding the term as at an end.⁷

While the landlord may treat the derelection of the ten-

1 Wall v. Hurds, 4 Gray, 256; Fisher v. Milliken, 8 Penn. 111.

2 Lawrence v. Brown, 5 N. Y. 394; Doe v. Wood, 14 M. & W. 681; Doe v. Johnson, McC. & Y. 141.

3 Dodd v. Acklow, 6 M. & G. 673.

4 Whitehead v. Clifford, 5 Gantt, 518.

5 Kerr v. Clark, 19 Mo. 132; Kees v. Miller, 25 Penn. 481; Cannan v. Hartly, 9 C. B. 634.

6 Cannan v. Hartly, 9 C. B. 634.

7 McKinney v. Reader, 7 Watts, 123; Torens v. Strickler, 7 Jones, 50.

ant as a surrender he need not do so unless he thinks proper, for the reason that the contract cannot be dissolved by the default of one of the parties.¹ The obligations of the express covenants in the lease may continue, notwithstanding the withdrawal of the tenant and the payment of rent by a third person as assignee,² and until the assignees of a lease elect to take the term, it remains in the lessee with all its antecedent rights and obligations, and when the term has been accepted by the assignees and has vested in them by operation of law, the lessee is still bound, by his express covenants, to pay rent or perform any other duty growing out or connected with the estate which the lease confers. This results from the general principle that the passage of a covenant running with the land to an assignee, will not vary or discharge the obligation of the original covenantor. When possession is given upon one side and accepted on the other with an express or implied agreement that the demise shall cease, a surrender will, according to the present authorities, take place by operation of law, although there is no written note or memorandum of the transaction, and the intention of the parties has to be gathered from their words and acts.³

SEC. 375. The same result follows where the premises are transferred to a third person, who comes in under a new lease, because his entry is virtually the entry of the landlord, and it would be useless to require the lessor to go through the ceremony of taking possession merely to go out again. The burden rests on the tenant, who must show affirmatively that the lease was determined by some act inconsistent with its continuance in which both parties joined; and proof that the landlord took the key, or even re-entered, will not be sufficient, unless it appears that he did so voluntarily, and not merely because it was thrust upon him by the tenant, and could not be got rid of without throwing it in the street.

¹ *Kees v. Miller*, 25 Penn. 480.

² *Jackson v. Brown*, 7 Johnson, 227; *Ghegan v. Young*, 23 Penn. 18; *Hall v. Hands*, 4 Gray, 256.

³ *Patchin v. Dickerman*, 31 Vermt. 663; *Grider's Appeal*, 5 Penn. 422; *Lamar v. McNamee*, 10; *G. & J.* 116; *Dodd v. Acklon*, 6 M. & G. 678.

While the possession must be yielded up to the landlord, or transferred with his assent to a third person, under a new letting, to constitute a surrender by operation of law, still whenever the parties have so far changed their position on the faith of a subsequent agreement, that it would be inequitable to enforce the lease, relief may be given in equity, or on the ground of equitable estoppel at law,¹ and a contract for the sale of the premises to the tenant, followed by part payment of the price, was held to put an end to the term by creating a new relation, inconsistent with its continuance.² A tenant who has covenanted with his landlord to give up fixtures at the end of the term, is not estopped from showing, in reduction of damages, that they were claimed and given up to a mortgagee, deducing title from the landlord.³ There is no estoppel upon a grantee to deny a grantor's title where the grant is of a fee, as there is in the case of a lease by indenture, which depends upon the obligation which the lessee is under to return the land and surrender the possession.⁴ If the lease be by deed poll, the lessee might deny the lessor's title.⁵ Wherever there is an obligation to restore possession to the lessor, the tenant is estopped to deny the title of him under whom he enters.⁶ A grantor by deed poll, as well as indenture, is estopped to deny the title of his grantee by setting up any claim which existed in his favor at the time of the grant.⁷ A man is estopped by his deed, to deny that he granted the estate thereby conveyed, or that he had good title to the same.⁸

SEC. 376. The same principle of estoppel applies to a purchaser from a tenant, to the relations of mortgagor and mortgagee, trustee and *cestui qui trust*, and generally to all

¹ Allen v. Jacques, 21 Wend. 628.

² Harnet v. Scribner, 16 Barb. 621.

³ Watson v. Lane, 11 Exch. 769.

⁴ Osterhout v. Shoemaker, 3 Hill, 513; Rawle Cov. 403; Ham v. Ham, 14 Me. 351; Watkins v. Holman, 16 Pet. 25; Small v. Proctor, 15 Mass. 495; Blight's Lessee v. Rochester, 7 Wheat, 548.

⁵ Bac. Abr. Leases, O.; Co. Lit. 476; Gaunt v. Wainman, 3 Bing. n. c. 69.

⁶ Miller v. Shacleford, 4 Dana, 286; Bac. Abr. Leases, O.; Great Falls Co. v. Worster, 15 N. H. 412.

⁷ Currier v. Earl, 13 Me. 216; Comstock v. Smith, 13 Pick. 116.

⁸ Wilkinson v. Scott, 17 Mass. 257; Fairley v. Fairley, 34 Miss. 18.

cases where one man obtains possession of real estate belonging to another by a recognition of his title. The relation of vendor and purchaser, under an executory contract for the sale of land, is so far in the nature of a tenancy, that the purchaser is estopped from denying the title of the vendor, so long as he retains possession under the contract.¹ It would be a violation of good faith to obtain possession under such a contract, and then deny the right of the other party to reclaim possession or the fruits of the contract. The acceptance of a deed and taking possession under it, operates as an estoppel *in pais* only where there is an obligation on him who accepts it, to retain possession as in the case of lessor and lessee, mortgagor and mortgagee.² When one enters on land under a contract to purchase, but neglects to pay the consideration money, he and those claiming under him are estopped to question the title of the vendor or his heirs.³ The relation of landlord and tenant is not created between vendor and vendee; yet, the vendee in ejectment by the owner against him, is absolutely estopped from either showing title in himself, or setting up an outstanding title in another; and the same rule applies to one coming into possession under the vendee, either with his consent or as an intruder.⁴ If a defendant (in an action of ejectment) enters under the lessor of the plaintiff by gift, purchase, lease, or otherwise, he cannot dispute the plaintiff's title.⁵ A party is always estopped to deny the validity of the title of the one under whom he claims.⁶ So where the defendant claims title under the defendant's own deed, he is estopped to allege that it did not convey title.⁷ So where a grantor in a deed to a school district delivered the same to a committee who gave him their note for the purchase money, he was estopped to deny their authority to accept

¹ Harle v. McCoy, 7 J. J. Marsh, 318; Moore v. Farrow, 3 A. K. Marsh, 41.

² Lanton v. Howe, 14 Wis. 241; Million v. Riley, 1 Dana; Winlock v. Hardy, 4 Lit. 272.

³ Gardner v. Greene, 5 R. I. 110; Wilson v. Watkins, 3 Pet. 48.

⁴ Jackson v. Walker, 7 Cow. 637.

⁵ Grandy v. Bailey, 13 Fred. 221.

⁶ Ward v. McIntosh, 12 Ohio S. 230; Wedge v. Moore, 6 Cush.

⁷ Williams v. Cush. 27 Geo. 512.

it.¹ A widow was estopped from relying on a grant by, or attornment to the holder of a paramount title, as a bar to the recovery by the plaintiff, to whom the land had been conveyed by her husband during his life.² In order to produce a result like this, the wife must come into possession under the husband, not the husband under the wife, and a widow may always give a title, held by her while sole, in evidence in an ejectment founded on a conveyance without her concurrence, after the marriage. A grantee who enters into and retains possession of land under a deed, will be estopped from disputing the title of not only the grantor, but of all those whose right relates back to or is derived from his.³ But it is not a necessary consequence that while the grantee is estopped from denying the grantor's title, that he is bound by all recitals or covenants in prior deeds which he may not have seen, they will not be conclusive or even evidence against him unless they enter into and qualify the operation of the instrument as a grant.

SEC. 377. The general principle that a tenant, trustee, mortgagor, purchaser or other person who comes into possession of real estate by recognizing the title of another, while so possessed is estopped from disputing that title, or purchasing an outstanding claim, without its enuring to the benefit of the party under whom he entered, does not apply to one who enters and claims in his own right and for his own benefit, nor estop him from fortifying his title by the purchase of any other which may protect him in the quiet enjoyment of the premises. In respect to estoppels as between lessor and lessee, and, so far as respects them, they are well established and should be maintained. The title of the lessee is, in fact, the title of the lessor. He comes in by virtue of it, and rests upon it to maintain and justify his possession. He professes to have no independent right in himself, and it is a part of the very essence of the contract under which he claims, that the paramount ownership of the lessor shall be acknowledged during the continuance of

¹ *Woolfolk v. Ashby*, 2 Met. (Ky.) 288.

² *Cox v. Lacy*, 3 Litt. 334.

³ *Case v. Benedict*, 9 Cush. 340.

the lease, and that possession shall be surrendered at its expiration. He cannot be allowed to controvert the title of the lessor without disparaging his own, and he cannot set up the title of another without violating that contract by which he obtained and holds possession, and breaking that faith which he has pledged, and the obligation of which is still continuing in full operation.¹ This estoppel is not applicable as between vendor and vendee. The vendee acquires the property for himself, and his faith is not pledged to maintain the title of the vendor. The rights of the vendor are intended to be extinguished by the sale, and he has no continuing interest in the maintenance of his title, unless he should be called upon in consequence of some covenant or warranty in his deed. The property having become, by the sale, the property of the vendee, he has a right to fortify that title by the purchase of any other which may protect him in the quiet enjoyment of the premises. No principle of morality restrains him from doing this ; nor is the letter or spirit of the contract violated by it. The payment of the purchase money is the only controversy which ought to arise between him and the vendor. How far he may be bound to this by law, or by the obligations of good faith, is a question depending on all the circumstances of the case, and in deciding it, all those circumstances are examinable.²

SEC. 378. A condition may be provided for the benefit of the vendee as well as the vendor, and the latter will be strictly bound by it, even though the breach does not affect the vendee's title to the property. The vendor is estopped to deny that his own act, done in violation of the condition, is invalid. Thus, where a town in Massachusetts sold to A. the right of fishing in a certain river, upon condition that they should sell no further right. The town afterwards sold another right of fishing to B., upon condition to be void if the town could not lawfully make such sale. A. refused to accept, and pay for the privilege sold him, but joined with B. in carrying on the fishing in B.'s own right. Held, although the sale to B. was void, the town could not maintain

¹ *Lanton v. Howe*, 14 Wis. 241.

² *Blight's Lessee v. Rochester*, 7 Wheat, R. 535.

an action against A. for the price which he agreed to pay. The condition in the conveyance to A. was intended for his benefit. The town having pretended to convey the privilege to B., were estopped from denying their power to do so.¹

SEC. 379. Mutuality is ordinarily essential to the existence of an estoppel, and as the grantor may show that his title was defective at the execution of the conveyance, and recover the land in opposition to his own deed, the grantee must, for the same reasons, be allowed to pursue the same course. An estoppel is said, by Coke, to arise from the acceptance of an estate, but, in order to create this estoppel, there must be an estate to be accepted, which, in the case of conveyances by deed, is the very point in question. This passage in Coke, therefore, only applies to the common law assurances, by feoffment, fine, or recovery, which, when properly employed, necessarily passed an estate, either by right or wrong. It must be apparent, then, if the acceptance of a conveyance estops the grantee from disputing the estate of the grantor, covenants for title would be mere nullities, because no recovery could be had on them in any case without showing that the title conveyed by the covenantor is defective.

SEC. 380. The grantee may deny the seizin or title of his grantor, for he holds adversely to him, and it is a matter of almost every-day occurrence.² The acceptance of a conveyance does not estop the grantee from showing that the grantor had no title in the land conveyed,³ unless possession accompanies the grant, and is still held under the deed. In this case it will be *prima facie*, if not conclusive, evidence that the grantor had the right which he assumed to convey.⁴ But where a vendee obtains and keeps possession of land under a contract of sale, which is not fulfilled, he cannot set up any defect in the title, as a defense to an action of

¹ Taunton v. Caswell, 4 Pick. 275.

² Gaunt v. Wainman, 3 Bing. N. C. 69; Small v. Proctor, 15 Mass. 499.

³ Averill v. Wilson, 4 Barb. 00; Sparrow v. Kingman, 1 N. Y. 242; Gardner v. Greene, 5 R. I. 104.

⁴ Ward v. McIntosh, 12 Ohio State, 231; Wedge v. Moore, 6 Cush. 8; Warder v. Woodruff, 6 English, 82.

ejectment by the vendor, or on a suit for the purchase money.¹ A vendee who goes into possession under the vendor, virtually occupies the position of tenant, and is not only estopped from using the defects in the vendor's title to deprive him of the land without paying him for it, but will be compelled to make any steps which he may have taken to complete the title, subservient to the purposes of the contract, instead of a means of defeating it. The estoppel, in its application to the relation of vendor and vendee is only where the circumstances are such as to render it the duty of the vendee to surrender the possession which he has derived from the vendor before contesting the title.²

SEC. 381. When parties in an action brought for the recovery of land claim through the same person, they will be obliged to treat his title as valid, and will not be allowed to rely on that portion which makes in their favor, and reject the rest.³ In summary proceedings for the recovery of land, if the landlord establishes the relation of landlord and tenant, the tenant cannot dispute landlord's title.⁴ Nor is a bailee or agent allowed to dispute the original title of the person from whom he has received title,⁵ and a vendee who takes a deed of an estate, in pursuance of previous articles of agreement, is estopped to deny the vendor's title, and an agreement under seal to accept a conveyance or lease, will estop the covenantee from disputing the title of the covenantor, in a subsequent action for the recovery of the land.⁶ Notwithstanding the cases cited, in support of the propositions, there is no general or inflexible rule, which prevents a grantee from showing that the grantor had no title that was capable of passing by the deed.

SEC. 382. The acceptance of a *devise* estops the devisee to set

¹ Galloway v. Finley, 12 Peters, 264; Jackson v. Hotchkiss, 6 Cow. 401.

² Blight's Lessee v. Rochester, 7 Wheat, 555; Price v. Johnson, 1 Ohio State, 390; Hill v. Hill, 4 Barb. 519; Sparow v. Kingman, 1 N.Y. 242; Gardner v. Greene, 5 R. I. 104; Glen v. Gibson, 9 Barb. 634.

³ Ward v. McIntosh, 12 Ohio State, 231; Jackson v. Ireland, 3 Wend. 100.

⁴ Ward v. Kelsey, 88 Barb. 269.

⁵ Vosburgh v. Huntington, 15 Abb. 254.

⁶ Sayles v. Smith, 12 Wend. 57; Tindal v. Den, 1 N. J. 651; Jackson v. Ayres, 14 John. 225; Springstein v. Schermerhorn, 12 Johns. 362.

up title in opposition to the will both at law and equity.¹ Where two persons both bearing the same name are entitled to lands and patents issue therefore to each for certain lands differently located, and in the delivery of the patents a mistake occurred, by which the patent of one was delivered to the other, but both acted on the fact of the case as existing at the time and profited out of the same, without objection being made on the part of either of them, neither their grantees nor any other person can raise the question of such mistake, in the delivery of the patents, each of them and their representatives are estopped from claiming the land of the other.² Where a state legislature has authorized the conveyance of a certain tract of land to a person, the presumption being that he solicited the grant and having acted under it, he and those claiming under him are estopped from denying the title of the estate.³

SEC. 383. The bailment or lease of chattels creates an estoppel of the same nature as that arising from a lease of land, and estops the bailee from disputing the title of the bailor or setting up an outstanding title in a third person, but leaves him free to excuse the failure or refusal to return the thing bailed, by proof that it has been delivered up to the true owner, or is withheld in consequence of a notice or demand from him and for his use and benefit.⁴ It has also been held that an auctioneer who has been sued for the proceeds of goods sold in the course of his business in behalf of another, is estopped from alleging that they were his own, in bar of an action brought for the proceeds or in mitigation of damages.⁵ A bailee or agent cannot dispute the original title, of the person from whom he has received property, and one who takes goods of another to return on the occurrence of a certain event; after the occurrence, the bailor will not

¹ *Miller v. Jones*, 29 Ala. 174; *Kranz v. Kroger*, 20 Ill. 74; *Hayden v. Davis*, 9 Cal. 573.

² *Smith v. Smith*, 14 Gray, 532; *Gardner v. Ladue*, 47 Ill. 212.

³ *Cary v. Whitney*, 48 Maine, 516.

⁴ *Ogle v. Atkins*, Taunt. 759; *Watson v. Lane*, 11 Exch. 769; *Burnett v. Fulton*, 5 Jones, 537.

⁵ *Osgood v. Nichols*, 5 Gray, 420.

be compelled to show a legal title to the goods.¹ The defendant is estopped to set up title in a third person as he would be in an action for use and occupation.²

¹ McNeil v. Philip, 1 McCord, 392.

² Manning v. Norwood, 2 Rep.

CHAPTER XIV.

APPLICATION OF ESTOPPEL TO MORTGAGES.

TECHNICAL ESTOPPEL, RECITALS, EQUITABLE ESTOPPEL.

SECTION 384. The doctrine, that a grantee, from one who had no title at the time of the conveyance, but has subsequently acquired one, takes it by *estoppel*, in virtue of the covenants in the deed, is applicable to mortgages. Thus a party who is in actual possession of land, but without title, mortgages it with warranty, and afterwards acquires a good title by purchase, the warranty takes immediate effect on the title so acquired and transfers it to the mortgagee, not only as against the mortgagor himself, but those claiming under him subsequently to the conveyance. So where one mortgaged land which was at the time subject to a judgment lien, (the deed containing what was equivalent to a warranty,) and then took the benefit of the bankrupt law, and afterwards purchased the property when sold under the judgment lien, he was estopped by his covenant from setting up such after acquired title to defeat the mortgage.¹ A person who contracting an obligation to another, grants a mortgage on property of which he is not then the owner, the mortgage is valid, if the debtor ever afterwards acquires the ownership of the property by whatever right.² A release by a mortgagee to the holder of the equity of redemption passes by the warranty, contained in the prior grant by the releasee, and gives the grantee an unencumbered title against a subsequent assignment of the mortgage, notwithstanding an allegation that a mortgage being a chattel interest, and that the rules applicable to estates in lands did not govern mortgages.³ This is on the principle that an after acquired title enures to the benefit of the grantee.

¹ Bush v Cooper, 18 How. 82.

² Amounett v. Annis, 16 La. 225.

³ Mickle v Townsend, 18 N. Y. 375.

SEC. 385. A mortgage by husband and wife, of her land, with covenants of warranty by both, estops both to deny her title at the time of the conveyance. Nor can they, in an action upon the mortgage against them, be permitted to show that after the commencement of such action she acquired a new title, under which they hold possession. The doctrine of *rebutter*, to avoid circuity of action, is not admissible in such cases.¹ Two successive mortgages, with covenants of warranty, were made of the same land. The second mortgagee bought the first mortgage, receiving from the first mortgagee a quit-claim deed. On the same day, the second mortgagee gave a mortgage, with covenants, to a creditor. There was no proof which of the two last named deeds was first delivered; but the grantee of one was a subscribing witness to the other, and both were attested by, and acknowledged before, the same magistrate. The right of redemption of the original mortgagor having expired, the last mortgagee brings ejectment against him for the land. The deed to plaintiff would be presumed to have been made after the deed to his grantor; or, if not, the covenants in the deed first executed had the effect to vest a title in the plaintiff, when the conveyance was made to him by *estoppel*; and this title was effectual against the defendant.²

SEC. 386. A statutory foreclosure of a usurious mortgage, and a sale of the mortgaged premises, followed by a sale thereof to a third person for a valuable consideration, without notice of the usury, will not convey a valid title to the land, or estop the mortgagor from alleging usury in the mortgage.³ But if judgment has been recovered upon a usurious contract secured by mortgage, and a new mortgage given, the mortgagor cannot resist a suit on the latter, upon the grounds of usury. The judgment upon the contract which was effected by usury having estopped the debtor from showing it in an action upon the judgment; he is equally estopped in a suit on the mortgage.⁴ So where a

¹ Nash v. Spofford, 10 Met. 102.

² Dudley v. Cadwell, 19 Conn. 218.

³ Wyland v. Stafford, 10 Barb. 558.

⁴ Thatcher v. Gammon, 12 Mass. 268.

mortgagee sues upon his mortgage, and the mortgagor defends upon the ground of usury, but fails in such defence, and afterwards conveys his right in the land, the purchaser cannot maintain ejectment against the mortgagee upon this ground, being estopped by the former judgment.¹ In the case of a mortgage by husband and wife of her estate, they remain in possession till breach of condition, and the mortgagee brings an action to foreclose against both, the wife must be joined as defendant. By joining in the mortgage she parts with her estate *pro tanto*, but no further. The equity of redemption is still hers, and cannot be disposed of by the husband without her consent, an entry *in pais*, with his assent, but unknown to her, will not foreclose her right to redeem, for the reason that in a suit for foreclosure she must be joined. In case of his death, the action proceeds against her. She is entitled to the benefit of the conditional judgment and may pay the debt, and prevent a foreclosure. The object of the statutory action is, to give the mortgagee such possession as will result in an absolute title, unless redeemed. It is inconsistent with the plain principles of law and justice, to hold that she and her estate shall be bound by the judgment, if she cannot be a party to the suit.²

SEC. 387. One may hold two mortgages on two different estates, to secure one debt, and foreclose one only. Whether this will bar a foreclosure of the other, depends on the value of the property foreclosed,³ if equal in value to the debt, it will have that effect. A joint bond from A. and B. was secured by mortgage of A. Afterwards A. gave a bond to B. assuming the former, and indemnifying B. against it. The parties having paid each half of the first bond, B. procured an assignment of it to a third person, for the purpose of obtaining a foreclosure. Held, a bill to foreclose by the assignee could not be maintained.⁴ The same estoppel applies to the mortgagee, who has been permitted to come in and defend the suit. The court say :⁵ " In substance, it seems to us to

¹ Adams v. Barnes, 17 Mass. 365

² Swan v. Wiswall, 15 Pick. 126.

³ Brouce v. Parker, 24 Vermt. 567.

⁴ Sturges v. Alyea, 3 Sand Ch. 188.

⁵ Davis v. Evans, 5 Ired. 525.

stand on the same reason with the other cases, in which it is held that the debtor in execution cannot set up a want of title in himself.

SEC. 388. As he has had the benefit of the sale in the payment of his debts, he ought not to say that he had nothing in the promises; and he cannot, with truth say so, as he had, at least, the possession and enjoyment of the land, and those he ought to give up; and to recover them is the object of the ejectment. The same principle applies equally to a case in which the debtor has only an equitable interest. The act of 1812 authorized the sale of an equity of redemption under a *fieri facias*. This act makes the equity of redemption, when sold under execution, a legal interest, to the extent, at least, of enforcing it by the recovery of possession from the mortgagor himself." So it has been held, that a tenant of the mortgagor, or a purchaser from him by executory contract, cannot dispute the title of the execution purchaser.¹

SEC. 389. It is provided by statute in Georgia and South Carolina, that a mortgagor who executes a second mortgage without disclosing in writing to the second mortgagee the existence of the prior mortgage, is not allowed to redeem the second mortgage. In South Carolina, if a person suffer a judgment or enter into a statute or recognizance binding his land, and afterwards mortgages it, without giving notice in writing of the prior incumbrance, unless within six months after a written demand he clear off such incumbrance, he is not allowed to redeem. These are substantially re-enactments of an act of Parliament. There are provisions similar to this (the concealment of a prior incumbrance by the mortgagor) in Tennessee and North Carolina.

SEC. 390. Where a mortgagee has taken possession of the mortgaged premises under a deed from the mortgagor, he is not at liberty to repudiate the mortgagor's title afterwards, and all releases obtained to cover defects in the title must be held to be obtained for the support of the mortgagor's title.² Where on the assignment of a mortgage to the complainant

¹ Dougherty v. Linthicum, 8 Dana, 194.

² Farmers' Bank v. Bronson, 14 Mich. 361.

and the mortgagor gave a written certificate that the mortgage was a valid lien upon the premises, and that it was given for part of the purchase money, and that there then existed no legal or equitable defense thereto, the mortgagor is estopped in equity by his own representations from setting up the defence of usury on the foreclosure of the mortgage.¹ Where a party negotiates with the agent of another for a loan, and a part of the money is only paid, and delivers a bond and mortgage for the full amount of the loan, and afterwards in a settlement by the mortgagee with the principal accepts the mortgage and bond in full settlement of his account for the face of the mortgage, and allowed that the money had been advanced to him, he is estopped from denying that he received the whole amount of the money, or from making any claim against the mortgagee on the foreclosure of the mortgage.² A mortgagor who has given a certificate that the mortgage debt is unpaid, is estopped to set up payment against one who took an assignment of the mortgage for value on the faith of the certificate.³ In a suit to foreclose a mortgage, the mortgagor is estopped to answer that the notes and mortgage, though running to the plaintiff, were, in fact, the property of a mercantile firm of which the plaintiff was a partner, having been given for goods purchased of the firm, and that the partners had made no assignment to the plaintiff.⁴

SEC. 391. In a suit against a mortgagor for the land mortgaged, he is estopped to deny that he had title when he mortgaged, or to set up title in a stranger.⁵ But where a mortgage refers to a note, the mortgagee is not estopped to deny the existence of such note.⁶ A mortgagor may in the absence of covenants for title, abandon the premises to the mortgagee, or suffer him to take possession and then re-enter

¹ *Diercks v. Kennedy*, 1 Green, (N. J.) 40.

² *Kirkpatrick v. Winans*, 1 Green, (N. J.) 407.

³ *Scott v. Sadler*, 55 Penn. 211.

⁴ *French v. Blanchard*, 16 Ind. 143.

⁵ *Wilkinson v. Scott*, 17 Mass. 249; *Small v. Proctor*, 15 Mass. 495; *Barker v. Harris*, 15 Wend. 615.

⁶ *Parker v. Parker*, 17 Mass. 370.

under the paramount title derived from a third person.¹ The maker of a mortgage for part of the purchase money, is estopped by such representations from setting up failure of consideration or defect of title as a defence thereto.² A party who has effected a sale of his land, subject to a mortgage given by a former owner, by representing that such mortgage is a subsisting lien for only two of the three notes secured thereby, is estopped from afterward claiming that it is also a lien for the third note, which he had in his own possession at the time of the sale.³ A mortgagee who has made a verbal agreement to discharge the mortgage upon payment of a part of the money due, and thus induced a party to purchase the mortgaged premises, may be estopped thereby from foreclosing his mortgage; but such agreement will not estop him from denying that the mortgage debt has been fully paid, in an action against him for refusing to discharge the mortgage.⁴ If the maker of a note and mortgage inform a party about to purchase them, after due, that the amount appearing by the instruments and indorsements thereon to be due is due and will be paid, and the latter, relying upon such statements, purchases the note and mortgage for a valuable consideration, without notice of any usury therein, such maker is estopped from setting up the usury to defeat the mortgage.⁵ He is so estopped, not only as against the person to whom such statements are made, but as against his assignee.⁶

SEC. 392. The same principles of estoppel *in pais* apply in the case of mortgages, and the rule that *no man shall take advantage of his own wrong*, is one of universal application. Thus, where the owner of personal property allowed it to be mortgaged in his presence to one ignorant of his title, he was estopped from setting up his ownership to the property against the mortgagee.⁷ Upon the same principle, if a

¹ Gillian v. Truman, 1 Bus. 95.

² Man v. Howland, 20 Wis. 282.

³ Briggs v. Seymour, 17 Wis. 255.

⁴ Stone v. Lamon, 6 Wis. 497.

⁵ Gill v. Rice, 13 Wis. 549.

⁶ Cary v. Wheeler, 14 Wis. 281.

⁷ Thompson v. Sanborn, 11 N. H. 201.

person having an incumbrance or an estate, deny the fact upon an inquiry being made by a person about to purchase it, equity will relieve against the incumbrance. So, likewise, where upon a treaty for a mortgage of an estate, a person who was entitled to be *recouped* out of the estate, in case a certain incumbrance was levied out of his own estate, was in communication with the mortgagee, to whom he was referred as a person to give information upon the subject of the transaction, but he gave the mortgagee no information of his equitable claim, it was held by Lord Chancellor Sugden that he could not afterwards set up his claim against the mortgagee.¹ A mortgagee, who acts as an adviser or witness in the sale of land, with full knowledge that the purchaser is buying with the impression that the mortgage is satisfied, will be estopped by such act from enforcing his mortgage.² Where the plaintiff purchased a mortgage at the solicitation of the mortgagors, and relying on their representations that a certain sum was due thereon, they are estopped from denying the truth of such representations, in an action brought by him to foreclose the mortgage. An execution creditor, who, at the sale of his debtor's chattel upon a previous execution, purchased it subject to a mortgage, which the officer making the sale assumed to be a valid lien, prior to both executions, is estopped from disputing the validity of such mortgage.³ A party to a foreclosure suit is estopped by the judgment therein, from disputing the title of a purchaser at the foreclosure sale.⁴ The assent of a mortgagor to the transfer of the mortgage as an indemnity to a third person, for uniting with him in as surety in a note to the mortgagee, estops him from saying that the note was given for a subsequent debt, or advance not covered by the mortgage, and that the surety was, consequently, not liable on the note.⁵ A mortgage of personal property, not yet acquired by the mortgagor, will take effect as against him and others, not having acquired precedent rights, on the title

¹ *Boyd v. Bolton*, 1 J. & L. 730.

² *Miller v. Biagham*, 3 Williams, 82.

³ *Lesley v. Johnson*, 41 Barb. 359.

⁴ *Horton v. Davis*, 21 N. Y. 495.

⁵ *White v. Evans*, 47 Barb. 179.

becoming vested in the mortgagor, and possession taken by the mortgagee.¹ Where one accepts a transfer of personal property, but expressly subject to a mortgage thereon which is held by another, he is estopped from claiming a prior lien upon the property, on account of a previous mortgage held by him, but which was not properly renewed.² Nor can he set up as a defence to an action by the subsequent mortgagee, his prior lien, where he has voluntarily become the bailee of the mortgagee, and accepted possession of the property as belonging to him, and having promised to return it to him on demand.³

SEC. 393. Where one buys personal property subject to mortgage, nominally from the mortgagor, but really from mortgagee, or with his concurrence, and by his request, the latter will not be allowed to set up a title under his mortgage. In one case,⁴ where property was conveyed, and a mortgage given back, to secure the purchase money, afterwards the mortgagor being unable to pay it, application was made to a third person, with the knowledge and by the desire of the mortgagee, who himself wrote to the party upon the subject to buy a part of the property at an advanced price. He accordingly bought it and paid the price, but the receipts were expressed to be on account of the mortgage debt. Before the purchase was completed the mortgagee expressed to the purchaser his perfect confidence in his fulfilling his engagements. Most of the property was delivered to the purchaser with the consent of the mortgagee and a part of it by the mortgagee himself. The part remaining in the mortgagee's hands having been sold at a reduced price, and the mortgage debt therefor, unsatisfied, the mortgagee claimed to hold the portion sold, and the purchaser filed a bill for a perpetual injunction, against the claim. Held, the mortgagee was a party to the contract of purchase, and the property sold was discharged from the mortgage. But where a mortgagor having sold the property, the mort-

¹ Wright v. Bolling, 27 Ala. 259.

² Walker v. Vaughn, 33 Conn. 577.

³ Jones v. Howell, 3 Rob. 438.

⁴ Skirving v. Neufville, 2 Des. 174.

gagee upon being informed of it, said he cared nothing about the property and did not want it, he might still assert his title under the mortgage.¹ Parker C. J. says he may thus claim: "There being no evidence of any consideration for it as a release, and the sale not having been made on the credit of it, if that might make any difference. It was a mere loose declaration, which cannot operate as an estoppel. It might have a tendency to show that the mortgage had been settled, and be used with other evidence to show the fact if alleged." So it has been held that where a mortgage is duly recorded, the mortgagee does not waive his claim by being present at a sale of the property, and not disclosing such claim.²

SEC. 394. A mortgagee promised, by writing, not under seal, to extend the time of payment, and a third person, in consequence, bought the estate from the mortgagor. The mortgagee being bound by his promise, could not maintain *scire facias* upon the mortgage until the time of such extension had expired.³ The judge, in delivering the opinion of the court, said: "Whether such a paper given to the debtor would have been binding, is not the question; though if a mortgagee gives a writing to his mortgagor that he will accept a debt presently due, if paid in instalments, at specified times, and receives one or more of them as they fall due, it may, in some instances, be a great fraud to afterwards proceed, before the other instalments fall due; and I am not prepared to say that it would, under all circumstances, be void. But that is not the case. It is not fair, nor honest to make a promise which induces a man, a stranger to the party, to buy his goods, and give his labor, to exchange his property, for an incumbered property, and promise not to press the incumbrance, and then say: I make nothing by the indulgence which I promised you, and I will not meet my promise. True, the mortgage was a deed under seal, and this not under seal; but it was, though informal, enough to induce him to exchange for that land, and pay one-third

¹ Steele v. Adams, 21 Ala. 534.

² White v. Philips, 12 N. H. 382.

³ Hoffman v. Lee, 3 Watts, 352.

of a debt which he was not liable for, and never would have been, except for that paper, and, in equity, it was as binding as if more formally drawn, under seal and witnessed." A mortgagee requested the holder of a note of the mortgagor, in which the mortgagee was surety, to obtain judgment on the note, and levy on and sell the mortgaged premises; he was also present at the sale, and asked one person to bid, and did not object to the sale. He was estopped to assert his title under the mortgage.¹ An attorney, holding a mortgage upon land, was employed by the mortgagor to draw the deed, and assist in the conveyance of a portion of the premises to an ignorant purchaser, and, although knowing that the purchaser was paying the full value of the property, concealed the fact of the mortgage. Neither the attorney nor his assignee could enforce the mortgage against this portion of the land.²

SEC. 395. "If parties claiming an interest in land look on and see it conveyed, or take part in the transaction without complaint or objection, they are estopped, in equity, from afterwards setting up a title against the grantees and those holding under them. This rule rests rather on the tendency of such conduct to mislead, than on any deceit actually intended or actually practiced in such case."³ "The rule of law is clear, that where one by his words or conduct wilfully causes another to believe the existence of a certain state of things, and induces him to act on that belief, so as to alter his own previous position, the former is concluded, from averring against the latter a different state of things as existing at the same time."⁴ A party who negligently or culpably stands by and allows another to contract on the faith and understanding of a fact which he can contradict, cannot afterwards dispute the fact, in an action against the person whom he has himself assisted in deceiving."⁵

Where a devise of lands to children of the testa-

¹ Morford v. Bliss, 12 B. Mon. 255.

² L'Amoureux v. Vandenburg, 7 Paige, 316.

³ Shepley v. Rangley, 1 Wood & M. 217.

⁴ Pickard v. Sears, 6 Ad. & Ell. 474.

⁵ Gregg v. Wells, 10 Ad. & Ell. 97.

tor was made with a provision that the part devised to one of them should be subject to the maintenance of his widow for life; the widow, claiming a beneficial interest in the lands devised, under a mortgage made to the testator and herself, deceptively acquiesced in the provisions of the will for several years, and thereby gave reason for confidence on the part of *bona fide* purchasers from the children, that such provisions were to be final and not disturbed, Held, although such purchasers were not proved, in fact, to have acted in this confidence, she was estopped to impeach their title.¹

SEC. 396. In another case the demandant gave in evidence a quit-claim deed from the tenant to Daniel Kimball, dated December 23, 1818; the levy of two executions on the 8th of November, 1827; a conveyance from the execution creditors to the demandant; a deed from Daniel to Leggett and Hance, dated November 27, 1828; and a deed from them to the demandant, dated April 25, 1832. The tenant then offered a bond from Daniel to him, dated December 23, 1818, conditioned to re-convey the property; a mortgage from the tenant to one Peabody, dated May 17, 1811, to secure a certain sum; an assignment of it by Peabody to Wheelwright and Clark, April 24, 1812; an assignment from them to one Buck, of June 2, 1827; and a deed from Buck, reciting a judgment on the mortgage and possession taken under it in 1824, to the tenant, dated June 2, 1827. The levies were duly recorded, as also all the deeds, all of which covered the demanded premises. The bond to re-convey was not recorded. The tenant had been in possession thirty years, built a house on the land, and made expensive repairs both before and after Buck's deed to him. Upon these facts the defendant having been defaulted, the default was taken off, and new trial ordered. Upon the new trial a verdict was rendered for the demandant. It appeared that after the tenant had paid off the mortgage, and taken a re-lease of the premises, having conveyed to Daniel and being still in possession, he knowingly suffered

¹ Ackla v. Ackla, 6 Penn. St. 228.

two executions to be levied on the premises as Daniel's without claiming title; that he pointed out the bounds at the time of the levy, and agreed to become a tenant and pay rent. He continued the tenancy till 1829, and rendered an account of repairs made by him to the plaintiff, who subsequently himself made repairs and put in another tenant. No claim was made under the mortgage, till after the plaintiff had purchased the title. The mortgage, under these circumstances, was declared extinguished; that it could be kept alive only by the equitable principle of being most for the mortgagee's interest, which was rebutted by a stronger equity on the part of the demandant, and could not be applied where it would promote a fraudulent purpose.¹

SEC. 397. One having a mortgage upon the property of his son, encouraged a third person to purchase the property, promising to abide by any agreement which the son might make concerning the mortgage. The son delivered the mortgage to the purchaser, but it was re-delivered to the father for the purpose of having it discharged. Held, the mortgage could not be enforced.² One co-tenant, owning one eighth of the land and holding a mortgage on the other seven eighths, joined the other in conveyance of the whole, the terms being as follows:—"Do hereby give, &c., that is to say, the said, &c., seven eighths parts, and the said, &c., one eighth part of the following piece, &c. And we do covenant, &c., that we are lawfully seized, &c.; that they are free of incumbrances and that we have good right to sell, &c. in the aforesaid proportions." The mortgagee did not disclose his mortgage to the purchaser. Held, an action could not be maintained upon the mortgage.³ Shepley, J. says:—"Admitting the covenants to be several and not joint, the effect of this transaction is, the demandant knowingly becomes a party to the most solemn assurance made by his mortgagor under his hand and seal, that the seven eighths are free of all incumbrances, and that he has good right to sell and convey the same. And he does this,

¹ Hatch v. Kimball, 16 Maine, 146.

² Curtis v. Trepp, 1 Clark, 318.

³ Durham v. Alden, 2 Appl. 228.

while he held a mortgage covering the premises, on which was due more than double the amount of the purchase money, without causing any exception of his own title to be introduced. He is as much bound by the declarations of his mortgagor as if they were his own. It would be a fraud upon the purchaser to permit him now to disturb that title. It would be no legal excuse, if done through ignorance or inattention, for it is more just that he should be the loser under such circumstances than that the innocent and faultless purchaser should." Thus when a mortgagee consents to the sale of the property, or permits it to be levied upon without asserting his claim he is estopped from claiming title to it as against the purchaser,¹ as between the mortgagee and the purchaser of property acquired subsequently to the mortgage, but mentioned therein as being conveyed thereby. the former, by attending the sale upon execution, bidding, and omitting to give the bidders notice of his claim, will be estopped from claiming a right to specific performance of the contract to give a mortgage.²

SEC. 398. A. executed mortgage deed of the same land, on the same day to B. and C. afterwards assigned his interest to D. E. having attached the premises as the property of C., and recovered judgment against him, sent an agent to D. who had knowledge of such judgment, to inquire whether there was any priority in the deed under which he claimed, to which D. replied, "There was not;" that "both deeds were delivered at the same time;" and that "B. had given a writing to that effect." E. thereupon took a mortgage of the premises from C. to secure his debt; C. being at this time insolvent. D.'s representation, however, was not true; the deed to B. having been, in fact, delivered first. On a bill of foreclosure, brought by D. against E., the plaintiff was estopped by these facts, from claiming a priority of title.

SEC. 399. A mortgage will be avoided as to third persons, by any misrepresentation or concealment, on the part of the mortgagee, with respect to his incumbrance, which induces them to purchase or make advances upon the land.

¹ *Grace v. Mercer*, 10 B. Mon. 157.

² *Otis v. Sill*, 8 Barb. 102.

This kind of fraud is chiefly cognizable in equity, though even courts of law will often take notice of it. In many cases, equity and law have concurrent jurisdiction. The principle of equity is, that where one seeks, by misrepresentation or even improper concealment of facts, in the course of a transaction, to mislead the judgment of another to his prejudice, the court will generally interfere. Mere concealment or *looking on* has the same effect, as using express words of inducement. "*Qui tacet, consentire videtur. Qui potest et debet vetare jubet.*" If a person maintain silence, when in conscience he ought to speak, equity will debar him from speaking when conscience requires him to be silent.¹ It is a fraud to conceal a fraud.² If a mortgagee stands by at the sale and receives the consideration, it is a discharge of that part from the mortgage.³ As a general thing it must appear that the acts would not have been done, and that the party must have conceived they would not have been done, except upon such encouragement;⁴ though, in some cases, even the ignorance of the party misleading has been held to make no difference. In a case of this kind, Chancery will not only refuse its aid to enforce the mortgage, but, upon a bill by the party injured, to *quiet his title*, will decree a perpetual injunction against enforcing the mortgage, declare it void, or order a release or conveyance.⁵ If a mortgagee has actual knowledge of the contents of a subsequent mortgage, and stands by, and witnesses the execution of the second mortgage, without disclosing his prior incumbrance, this is such a fraud in him as to authorize a court of equity to postpone such prior incumbrance, so as to let in the subsequent mortgage.⁶ A mortgagee without notice of an outstanding title, in one who encourages him to take the mortgage, or stands by and makes no objection, will be protected against it.⁷

¹ Hall v. Fisher, 9 Barb. 17.

² 1 Story Eq. 390.

³ McCormick v. Digby, 8 Digby, 99.

⁴ Ibbotson v. Rhodes, 2 Vermt. 554; Otis v. Sill, 8 Barb. 102.

⁵ Hoffman v. Lee, 3 Watts 352; Napier v. Elan, 6 Yerg. 108; Jeremy's Eq. 385; Hill R. Prop. 452; Story Eq. 375; Grace v. Mercer, 10 B. Mon. 157; Carter v. Longworth, 4 Ohio, 385; Lavallo v. Barnett, 1 Black, 181.

⁶ Brinkerhoff v. Lausing, 4 Johns. Ch. 658.

⁷ Green v. Price, 1 Mumf. 449.

SEC. 400. So where A. bought land of B. and gave a mortgage for the purchase money after judgments had been entered against A., the mortgage was recorded. C. bought the land at sheriff's sale on one of the judgments subject to the mortgage, and in consequence paid much less than the value of the land; C. sold, the vendee having knowledge and retaining enough of the purchase money to pay the mortgage, is estopped from denying that he bought subject to the mortgage.¹ A mortgagee, who after assigning an interest in the mortgage debt and files a bill in the name of himself and the assignee to foreclose, and alleges therein under oath the assignment, he is estopped from setting up usury in the assignment.² An assignee of a mortgage after foreclosure, who promises a subsequent mortgagee that he may redeem after the expiration of the decree, provided the mortgagor does not, is estopped in equity from denying the right of said mortgagor to redeem, and the estoppel applies to a purchaser of the decree cognizant of the mortgagee's claim and right to redeem under the decree.³ So where a bond and mortgage is made to certain persons as executors, and the money due is also payable to them, and the survivor or survivors, they are estopped to claim that they hold in a different personal capacity.⁴ Where a mortgage was made by five joint trustees, and a mortgage of the joint trust property was given to secure the note, purporting to convey the whole estate, but signed by only four of the trustees, although drawn in the name of all, and it appeared from the circumstances that the other trustee must have known of the transaction, and that he never made any objection to it, it was held that the mortgage was binding upon him by an equitable estoppel, and that the purchaser of the equity of redemption of the mortgagors at a sheriff's sale was also bound by it.⁵ A mortgagee who knows that another person is about to lend money on the mortgaged premises, and denies that he has a mortgage, or asserts that it is satisfied, will be post-

¹ Cook v. Douglass, 56 Penn. 51.

² Mumford v. Am. Life Ins. Co., 4 N. Y. 163.

³ Woodward's Adms. v. Couchey, 11 Vermt. 496.

⁴ People v. Miner, 37 Barbours. 446.

⁵ State Bank v. Campbell, 2 Rich. Eq. 179.

poned to the second mortgagee, who is induced to lend money by this concealment or misrepresentation.¹ So a concealment or entry of satisfaction of a mortgage procured by fraudulent representations to the injury of third parties, is void.²

SEC. 401. A mortgagor is estopped from denying that he had title, and from setting up title in third persons.³ Where a person takes from another a mortgage of lands, the record title, which is in himself at the time such mortgage is executed, and in good faith assigns such mortgage, and it is foreclosed, neither such mortgagee nor his representatives or privies can set up such a prior title in him to defeat the mortgage. They are estopped by his acts, and it makes no difference whether it can be proved that he ever executed a deed of the lands to the mortgagor or not.⁴ So where a vendor puts his vendee in possession, and executed and placed in his hands a deed of conveyance, for the land sold, with an understanding between them, that the deed should not be considered delivered or become effectual until the purchase money should be paid, and the vendee subsequently put the deed upon record without paying the purchase money, mortgaged the land to a *bona fide* mortgagee for value, without notice. The vendor was estopped, as between him and the mortgagee, from denying the delivery of the deed, or asserting any claim to the land.⁵

SEC. 402. Where a party gave a mortgage upon real estate in his possession, the title to which is in another party, who afterwards conveyed to the mortgagor, and in such conveyance described the property conveyed as subject to his mortgage, it was held that, as against the grantee and all persons claiming under him, the land conveyed was as effectually charged with the encumbrance as if it had been expressly mortgaged therefor.⁶ *Bona fide* purchasers are bound by the estoppel of prior grants, for the reason

¹ Lee v. Munroe, 7 Cranch, 366.

² Buckingham v. McLane, 13 How. 150 ; McLean v. Lafayette Bank, 3 McL. 589.

³ Barber v. Harris, 15 Wend. 615.

⁴ Rogers v. Cross, 3 Chand. 39.

⁵ Resor v. O. & M. R. R. 17 Ohio S. 139.

⁶ Sweetzer v. Jones, 35 Vt. 317.

that the assignment of a mortgage is always subject to the equities of the mortgagor and those claiming under him. An assignment of a mortgage estops the mortgagor from alleging that it was satisfied.¹ A mortgagor is estopped to deny the fact of an entry having been made for condition broken, by the mortgagee, when he has signed a certificate to that effect on the deed.² But merely suffering the mortgagee to enter and record a certificate of such entry for a breach of the condition does not after a lapse of three years, estop the mortgagor from denying any breach, and showing that none had been made.³ A defendant in an action to foreclose a purchase money mortgage, cannot set up as a defense a failure of title where there has been no eviction or disturbance of his possession.⁴ Where a trustee and a *cestui qui trust* mortgage, the trust property in breach of the trust they are estopped from setting up such breach in defense of an action by the mortgagee of the mortgage.⁵ The validity of a mortgage and the regularity of the judgment on a *scire facias* obtained on it cannot be questioned by one not connected with the mortgagor's title as grantee, mortgagee, judgment creditor, &c. Thus where a married woman executed a mortgage in her maiden name, *scire facias* on it were issued against her in that name, judgment was recovered after two *nihil*s, and the land sold by the sheriff, it was held that the purchaser took a good title, and the validity of the mortgage could not be enquired into in an action of ejectment for the mortgaged premises.⁶ Where a mortgage is made in express terms subject to certain bonds secured by prior mortgage, the bonds being negotiable in form, and having in fact passed into circulation before such mortgage was given, the junior mortgagees and all parties claiming under them are estopped from denying the amount or validity of such bonds in the hands of

¹ Jackson v. Waldron, 13 Wend. 178; Edwards v. Varick, 3 Denio, 665.

² Bennett v. Conant, 10 Cush. 163.

³ Petrie v. Case, 11 Gray, 478.

⁴ Farnam v. Hotchkiss, 2 Keyes, 9.

⁵ Ryder v. Sisson, 7 R. I. 341.

⁶ Hartman v. Ogman, 54 Penn, 120; Glass v. Gieben. Id. 266.

bona fide holders.¹ The release of a mortgage, obtained in good faith from a foreign administrator, estops the same administrator after taking out letters within the state from objecting that he had no power to release.²

SEC. 403. The mortgagor of a chattel, having the right of possession for a certain period, or a purchaser from him, cannot, after its expiration, dispute the title of the mortgagee.³ Where a mortgagee of personal property, not in possession, is present at the sale of such property by the mortgagor to another, and such mortgagee, on being asked to fix the price between the mortgagor and purchaser, but does not notify the purchaser of his mortgage, and the property is afterwards delivered to the purchaser, the mortgagee cannot recover the property as against such purchaser, without notice.⁴ A husband who is present at the execution of a mortgage by his wife, of his personal property, and who assents to its execution, is as effectually bound by the mortgage as though he executed it himself.⁵ So, where a husband permits, without objection, his wife to hold herself out before the world as transacting business on her sole or separate account, and to deal with the property as her own, the husband is estopped from setting up any claim to the same against the mortgagee of his wife, although he may advance money to her in business, and she uses it to purchase the mortgaged property with.⁶ If a party having knowledge that he has title to property, stands by and sees another mortgage it to a third person, to secure a debt or liability incurred at the time, without giving notice of his title, he is estopped from setting it up afterwards in a suit at law.⁷

¹ *Bronson v. La Crosse R. R.*, 2 Wall, 283.

² *Vroome v. Van Horne*, 11 Paige, 549.

³ *Holmes v. Hall*, 3 Dev. 98.

⁴ *Brooks v. Record*, 47 Ill. 30.

⁵ *Edgerton v. Thomas*, 9 N. Y. 40.

⁶ *Sammis v. McLaughlin*, 35 N. Y. 647; *Sherman v. Elder*, 24 N. Y. 381;

Smith v. Knapp, 27 N. Y. 277; *Buckley v. Wells*, 33 N. Y. 518.

⁷ *Thompson v. Sanborn*, 11 N. H. 201.

CHAPTER XV.

EQUITABLE ESTOPPELS AS AFFECTING THE
TITLE TO LAND.

SECTION 404. As we have heretofore seen, in the case of estoppels by deed, that the most striking instances of its application were in regard to its effect on the title to land in passing an after acquired estate. It is proper to notice the same application of the doctrine of equitable estoppel in regard to real or personal property in a manner as effectual, if not more so, than where a vendor or purchaser attempts, by deed, to convey land without any title, in its action in conveying real and personal property without any written conveyance or agreement, or express intention so to do.

SEC. 405. No portion of the law of equitable estoppel is more important than that which applies, when a sale is made without authority or title, and is sanctioned at the time or is ratified subsequently by the owner, and renders the title of the purchaser valid, by imposing silence on the only person entitled to contest it. This principle applies irrespective of the nature of the property sold, and the estoppel will be so moulded as to prevent fraud and injustice in whatever form it may present itself. The principle that one who encourages, or even stands by and sanctions, the acquisition of land by another, will not only be estopped from invalidating the interest thus acquired, by the subsequent assertion of a title, with full knowledge at the time, but may be compelled to make a conveyance to the purchaser, is an old and well established one at equity, and also in modern times in courts of law. The rule is a broad one, and is equally applicable, whether the sale be public or private, the act of the parties themselves or the act of the law, with this limitation in regard to sales by authority of law, that as the sale is of the interest only of the defendant in the execution, requiring clearer proof than is necessary in other cases to

estop third persons from asserting an adverse interest which is not *prima facie* within the scope of the sale.¹

SEC. 406. The statute of frauds requires a writing, when real estate is in question, and the title to land cannot be transferred, or its assertion precluded under ordinary circumstances by an act *in pais* or an oral declaration.

SEC. 407. Equity has long held that the statute shall not be used as a cloak for that which it was designed to suppress, and where a parol agreement has been so far executed that it cannot be rescinded without an actual or constructive fraud on the purchaser, it will be specifically enforced against the vendor; and a man who stands by and encourages, or even acquiesces in, the sale of land which is his own, as the property of another, will be restrained from disputing the title of the purchaser, or even compelled to perfect it by conveying the estate to such purchaser. The original source of relief, under such circumstances, was in courts of equity, but it is now also granted in the form of an equitable estoppel at law. The questions involved in the application of equitable estoppels, on real estate, is one that is both difficult and important; while it is generally true that a parol agreement cannot be binding upon the title to real estate, without an apparent violation of the statute of frauds, which require a writing, when the realty is in question; it is also a well established principle of equity that the statute shall not be used as a means of effecting the fraud which was the object of the statute to prevent, and withdraws every case not within its spirit from the rigor of its letter, if it can be done without violating the general policy of the statute, and creating the uncertainty which it was meant to obviate. It is a well established principle of equity, that part performance of a parol agreement or contract will take a verbal sale of land out of the statute of frauds, and when a verbal sale is made, accompanied by possession of the estate, equity will compel the vendor to make a conveyance. So that an estate in land may be transferred from one man to another, without a writing, and this principle is applicable to those cases where

¹ *Menges v. Vyster*, 4 W. & S. 420.

the owner fails to give notice of his title to the purchaser, when the circumstances are such as to make it his duty to do so, and while a title does not actually pass, a court of equity will decree a conveyance. So that it may be considered as a well settled principle that the title of real estate may be barred by matter *in pais*, but not as to the forum wherein the remedy must be sought.

SEC. 408. The statutory provision, which renders a writing necessary for the creation of an estate in land, is not dispensed with either at law or equity unless on the ground of actual or constructive fraud. A party who relies on a verbal contract and thus dispenses with the conclusiveness of written evidence should not be allowed to have or receive the benefits of equitable estoppels to repair his negligence.¹ The retraction of a promise on which another has acted is regarded as a constructive fraud which warrants the intervention of equity or a resort to the aid of an estoppel at law. Though there may have been no concealment or misrepresentation, and the only ground of the relief is the breach of the promise.² But where men rely on the honor of those with whom they are dealing instead of using the means recognized by law, the law leaves them to suffer from the results of their undue confidence and discretion; but where a party entered upon land in consequence of a parol agreement of the owner to exchange for other lands, made improvements with the knowledge of the owner, the owner cannot take advantage of the want of a contract that would bind him to convey. A party by whose encouragement expenditures have been made to such an extent as to be incapable of reimbursement except by enjoyment will be enjoined from disturbing the possession; he is estopped because he would wrong the party by withdrawing his consent.³ But a parol estoppel cannot operate to transfer the legal title to land.⁴ Where one makes a deed on Sunday, and fraudulently dates

¹ Burke v. Brewer, 2 Met. 421; Batchelder v. Sanborn, 24 N. H. 474; McAfferty v. Conover 7 Ohio St. 99.

² McAfferty v. Conover, 7 Ohio St. 99.

³ Big Mountains Imp. Co., 51 Penn. 361.

⁴ Barker v. Bell, 37 Ala. 359; McPherson v. Walters, 16 Ala 714

it as of another day, and his grantee conveys the estate to a stranger who is ignorant of this fact, the grantor is estopped to set up that the original deed was made on Sunday.¹

SEC. 409. In addition to the fundamental legal principle of law, *nullus commodum capere potest de injuria sua propria*, as one of the essential elements of an equitable estoppel, in regard to its application to title to land, there is one which applies still more forcibly, viz: *Qui tacit consentire videtur*—He who is silent when conscience requires him to speak, shall be debarred from speaking when conscience requires him to keep silent.² No estoppel can be created by mere silence or acquiescence, unless there are some special circumstances which make it necessary to speak.³ When such are the circumstances, equity unhesitatingly applies the maxim, *Qui tacit consentire videtur*. If he who ought to have explained himself clearly and plainly, has not done it when the occasion required and opportunity was presented to him, he is not allowed to introduce subsequent restrictions which he did not at the proper time express.⁴ Thus, where a party negligently and culpably stands by and allows another to contract on the faith of an understanding which he can contradict, he is afterwards estopped from disputing the facts, in an action against the person whom he has assisted in deceiving,⁵ upon the principle, that between innocent purchasers, he who causes the injury must suffer.⁶ *Qui non prohibet quod prohibere potest assentire videtur*, is also one of the fundamental maxims and rules of law particularly applicable to this branch of estoppels, especially those acts which, in equity, and to a great extent in law, are regarded as the foundation of the estoppel which is created by the silence, acquiescence, or consent of the owner of real or personal property in its disposal to a stranger by one not

¹ Love v. Wells, 25 Ind. 503.

² Wendell v. Van Renssalaer, 1 John. Ch. 354; Morford v. Bliss, 12 B. Mon. 255.

³ Taylor v. Ely, 25 Com. 250; Clabaugh v. Byerly, 7 Gil. 384; Hill v. Eply, 30 Penn. 331.

⁴ Mitchell v. Mount, 31 N. Y. 356; S. C. 19 Abb; Corkhill v. Launder, 44 Barb. 218.

⁵ Hollingsworth v. Hancock, 7 Fla. 338.

⁶ Millingar v. Long, 61 Penn. 471.

having the title, but whom, if allowed to set up his claim of title or ownership to the property after its purchase by a stranger, would be perpetrating a gross fraud upon the party whom he, by his acquiescence, silence, and consent, has misled. "He who can forbid, but does not, is deemed to have assented." The law will not permit a man to say what he has said and done as a solemn act, by which others have acquired rights, was not true; nor will it allow one who has, in a like solemn manner, admitted a matter to be true, to allege it to be false.¹ If one having a title to land looks on and suffers another to purchase and expend money on the land, without making known his claim, he will not be permitted afterwards to assert his title against an innocent purchaser.

SEC. 410. The effect of an estoppel *in pais* is to prevent the assertion of an unequivocal right, or preclude a good defense, and justice demands that it should not be enforced unless substantiated in every particular. The ground upon which the estoppel proceeds is fraud, actual or constructive, on the part of the person sought to be estopped. What will amount to the suggestion of a falsehood or the suppression of the truth, may be difficult to determine in all cases, but some turpitude, some inexcusable wrong that constituted the direct motive, or induced the outlay or purchase, is necessary to give silence or acquiescence to the force of an estoppel *in pais*. Hence the ignorance of the true state of title on the part of the purchaser must concur with wilful misrepresentation or concealment on the part of the person estopped. In order to apply an estoppel it is indispensable that the party standing by and concealing his rights should be fully apprized of them, and should by his conduct or gross neglect encourage or influence the purchaser. Rights can be lost or forfeited only by such conduct as would make it fraudulent and against conscience to assert them. Therefore if one act in such a manner as intentionally to make another believe that he has no rights, or has abandoned them, and the other trusting to that belief, does an act which he would not have

¹ Ham v. Ham, 14 Me. 351; Hicks v. Cram, 17 Verm. 449.

done, the fraudulent party will be estopped from asserting his right.¹

SEC. 411. But to constitute an equitable or estoppel *in pais* the act or admission must be shown to have had a direct or immediate influence upon the conduct of the party claiming its benefit; no such estoppel can arise without proof of wrong on one side, and injury suffered or apprehended on the other, nor unless the injury be so clearly connected with the wrong that it might and ought to have been foreseen by the guilty party. There must unquestionably, be some degree of wrong, for a statement innocent in itself and susceptible of being withdrawn or contradicted, unless it be made with the knowledge, that it will or may be acted upon, cannot be rendered binding by what subsequently occurs. The only qualifications which seems necessary to this doctrine as laid down, is that a party may be estopped by acts and delarations which were designed to influence another who has acted upon them, although both parties were ignorant that what is thereby represented is not true; for if one of two innocent parties must suffer, he through whose agency the loss occurred should sustain it.

SEC. 412. Estoppels *in pais* are well founded, when confined to the legitimate purpose of preventing one man from being injured by the acts or misrepresentations of another. Where no injury results from a misrepresentation, its decision belongs to the forum of morals, and not to the judicial tribunals. The connection between the wrong and the injury should be direct and apparent, and such as to leave no reasonable doubt that the former is the efficient cause of the latter. For as the effect of an estoppel is to prevent the assertion of rights unquestionably valid, or preclude defenses which would otherwise be good, justice requires that it should not be enforced, unless sustained in every particular. In order, therefore, to raise an express or implied admission of one party from the rank of evidence, to the dignity of an estoppel, it must not only be shown that its retraction will be injurious to the other party, but that the

¹ Bunelson v. Bunelson, 28 Tex. 384.

injury results from the course of action induced by the admission. Whatever, therefore, the degree of moral wrong on one side, and injury on the other, there will be no estoppel, unless the injury be the direct and natural result of the wrong.

SEC. 413. The true rule seems to be, and with it goes the later and better considered cases, that the mere presence of the owner, if he have concealed no fact of which he was informed, and which the purchaser could not have learned by the use of reasonable diligence, will not create an estoppel, unless the purchaser can show that he had reason to suppose, from the presence of the owner, that he sanctioned and acquiesced in the sale.

SEC. 414. A party will, in many instances, be concluded by his declarations or conduct which have influenced the conduct of another to his injury. But the application of this principle with respect to the title to real property, it must appear, first, that the party making the admission, by his declaration or conduct, was apprised of the true state of his own title; second, that he made the admission with intent to deceive, or with such culpable and careless negligence as to amount to constructive fraud; third, that the other party was not only destitute of all knowledge of the true state of the title, but of all means of acquiring such knowledge; and further, that he relied directly on such admission, and will be injured by allowing its truth to be disproved. It is only when silence becomes a fraud that it postpones. The element of fraud is essential either in the intention of the party estopped, or in the effect of the evidence which he attempts to set up. The primary ground of this estoppel is, that it would be a fraud in a party to assert what his previous conduct had denied, when on the faith of that denial others have acted.

SEC. 415. One essential element of every equitable estoppel, by which a man is to be precluded from claiming what is his own, is ignorance on the part of the purchaser or party claiming the benefit of the estoppel, as to the true state of the title. To estop a vendor of real estate, by statements in regard to the effect of his deed or extent of the

grant, such ignorance on the part of the purchaser must concur with knowledge of his title, and wilful concealment or misrepresentation in regard to it on the part of the vendor, or such gross negligence or indifference to the rights of others as under the circumstances to be equivalent to actual and premeditated fraud. It must also appear that the language or conduct of such vendor was the direct inducement to the purchase by the other party,¹ and that the purchaser will suffer if the vendor is permitted to deny it.² The principle of estoppels *in pais* apply equally to transactions in regard to real and personal property. It does not at all touch the question of creating title to real estate by parol.³ But such personal property must be in existence and expressly designated at the time, because the vendor by such sale asserts that he has an existing title, and is bound to support and defend it, and the purchaser has a right to rely on such assertion, but when the property sold is not in existence, the reason fails and the estoppel does not apply.⁴ If a party who is interested in an estate, and who has knowledge of his rights, misleads another into dealing with the estate, he will be postponed in equity to the party so misled, and will be required to make good his representations, even to the extent of any claim or title he may have in or to the estate, and this though the representations are verbal and without consideration moving directly from him.⁵ The estoppel does not operate as a conveyance of the interest of the party making them, but by way of estoppel preclude him from setting up any claim or title in himself at the time against the party he misleads. This estoppel in many states is not available in a court of law, but may be enforced in a court of equity.

SEC. 416. Where a person knowing his own title to property, even although covert or under age, encourages, or even lies by, and permits a purchaser to buy it, equity will com-

¹ Gove v. White, 20 Wis. 425.

² Norton v. Keany, 10 Wis. 443.

³ Corkhill v. Lander, 44 Barb. 218.

⁴ Chynourth v. Tenney, 10 Wis. 397.

⁵ David v. Shepard, 40 Ala. 587, Adams Eq. 373.

pel such person to convey to the purchaser.¹ When anything in order to a purchaser is publicly transacted, and a third person, knowing thereof, and of his own right to the lands intended to be purchased, does not give the purchaser notice of such right, he shall never afterwards be admitted to set up such right to avoid the purchase; it is apparent fraud in him not to give notice of his title to the intended purchaser; and in such case *infancy or coverture* shall be no excuse; for though the law prescribes formal conveyances and assurances for the sales and contracts of infants and *femes covert*, which every person who contracts with them is presumed to know; and if they do not take such conveyances as are necessary, they are to be blamed for their own carelessness, when they act with their eyes open; yet, when their right is secret, and not known to the purchaser, but to themselves, or to such others who will not give the purchaser notice of such right, so that there is no *laches* in him, the court will relieve against that right, if the person interested will not give the purchaser notice of it, knowing he is about to make the purchase; neither is it necessary that such infant or *feme covert* should be active in promoting the purchase, if it appears that they were so privy to it that it could not be done without their knowledge.² The distinction seems to be between participation or procurement, and silence or acquiescence, the one imposing no liability unless there is wilful concealment or fraud;³ while the other may create a bar, notwithstanding good faith and fair dealing, by rendering it more just to throw the loss on the party in whose conduct it originated, than on a purchaser who has been induced to buy by assurances, which, though believed at the time, turn out to be unfounded.⁴ No one should be

¹ Wendell v. Remsellaer, 1 Johnson's Ch. 354; Carr v. Wallace, 7 Watts. 100; Wells v. Pierce, 27 N. H. 7503; Higgins v. Ferguson, 14 Ill. 269; Belknap v. Nevins, 2 Johnson, 573; Cheeney v. Arnold, 18 Barb. 435; Sanderson v. Ballance, 3 Jones, Eq. 322; Godefroy v. Caldwell, 2 Cal. 489.

² Clare v. Earl of Bedford, 13 Vin. 536; Berrisford v. Milward, 2 Atk. 49; Conyert v. Gerteken, 2 Madd. 40; Thompson v. Simpson, 2 T. & L. 110; Goyett v. Richmond, 7 Sim. 1; Overton v. Banister, 3 Hare. 503.

³ Clabaugh v. Byerly, 7 Gill. 381; Strong v. Ellsworth, 26 Vermont, 369.

⁴ Wells v. Pierce, 27 N. H. 503; Willis v. Swartze, 28 Penn. 413.

made answerable for stating his opinion truly, or for answering the question put to him according to his belief or conviction.¹

SEC. 417. Courts of equity will not disregard the principles of estoppel, except in those cases where it becomes necessary to prevent injustice through accident, fraud, or mistake.² Positive acts tending to mislead one ignorant of the truth, which do mislead him to his injury, are good grounds of estoppel and ignorance of title on the part of him who is estopped, will not excuse him. Silence will postpone a title where one knowing his title should speak out. One led by such silence ignorantly and innocently to rest on his title, believing it to be secure, and to expend money and make improvements, will be protected.³ Where a warehouse built by a railroad company, with permission of one tenant in common, had burnt down, and the railroad company re-erected another on the same site, if the other tenant in common has knowledge that the company were re-erecting and gave no notice of his claim, and the company believing he sanctioned the original management for erecting the warehouse, he was estopped after its completion from setting up his claim.⁴

SEC. 418. It is not necessary in order to create an equitable estoppel that the party should design to mislead. It is sufficient if the act was calculated to mislead, and actually has misled, a person acting upon it in good faith, and who exercised reasonable care and diligence under all the circumstances,⁵ and effectually estops the party from averring a state of facts different from what the party acted upon.⁶ Chancellor Kent said :⁷ "There is no principle better established, nor one founded on more solid considerations of

1 *Parker v. Parker*, 2 Metcalf, 421 ; *Lawrence v. Brown*, 5 N. Y. 394; *Morris v. Moore*, 1 Humphreys, 343; *Tilghman v. West*, 8 Iredell, 83; *Royston v. Harris*, 15 Alabama, 309.

2 *Sprigg v. Bank of Mt. Pleasant*, 1 McLean, 384.

3 *Chapman v. Chapman*, 59 Penn. 214.

4 *Cumberland R. R. Co. v. McLanahan*, 59 Penn. 23.

5 *Manufacturers' Bank v. Hazard*, 30 N. Y. 226.

6 *Racine Bank v. Lathrop*, 12 Wis. 466; *Chymouth v. Tenny*, 10 Wis. 397.

7 *Wendell v. Van Renssalaer*, 1 John, ch. 354.

equity and public utility, than that which declares that a man who knowingly, though he does it passively, looks on and suffers another to purchase or expend money on land, under an erroneous opinion of title, without making known his claim, shall not be permitted to exercise his legal right against such person. It would be an act of fraud and injustice, and his conscience is bound by this equitable estoppel. This rule being one that has long since been well settled at equity, is enforced to a great extent in courts of law.¹

SEC. 419. Standing by does not necessarily imply actual presence, but it will exist for all the purposes of an estoppel whenever there is such a knowledge of a rule and of the attendant circumstances as makes it a duty to warn the purchaser;² and while no one will be bound by an estoppel arising from silence who is not shown to have been guilty of fraud, or of that gross neglect and ignorance which, when the rights of others are in question, is constructively fraudulent, still a man who connives at a deceit, which he might have exposed, will be justly required to bear the consequences, instead of allowing them to fall on the injured party. Thus a grantee who suffers premises which have been conveyed to him to be sold to a third person will not be allowed to set up his title to the injury of such purchaser.³ Where parties stand by and acquiesce in the sale of certain property, and allow the purchaser to go into possession,⁴ they are estopped from afterwards claiming title in themselves. A man will not be permitted to recover land which he has encouraged another to occupy and improve, even when the encouragement was given under the influence of a mistake and in ignorance of his own better right.⁵

SEC. 420. A mistake as to the law forms no ground for re-

¹ *Nixon v. Carco*, 28 Miss. 414; *Beaupland v. McKeen*, 28 Penn. 124; *Shull v. Biscoe*, 18 Ark. 142; *Ferguson v. Miller*, 4 Cal. 97; *Cochran v. Harrow*, 22 Ill. 345; *Funk v. Newcomer*, 10 Md. 301; *Gottschalk v. De Santu*, 12 La. 473.

² *State v. Holloway*, 8 Blackford, 45; *Gatling v. Rodman*, 6 Ind. 289; *Richardson v. Chickering*, 1 N. H. 380.

³ *Sanderson v. Ballance*, 2 Jones, Eq. 323.

⁴ *Ryder v. Union India Rubber Co.* 4 Bosw. 169.

⁵ *McKelvey v. Truby*, 4 W. & S. 358.

forming a contract, yet where a party, acting under a mistake of law or of fact, does acts which mislead the adverse party, he is estopped, as well as if he was not acting under such mistake; thus to a suit brought for the partition of a lot, several persons who owned the rear part thereof were made parties. In the decree, the description of the property ordered to be sold did not include the rear part of the lot. The whole not being sold, F., one of the owners of the rear portion, although knowing of the sale, made no objection, and accepted her share of the proceeds, but executed no release. Held, that her acts, in not objecting to the sale and afterwards receiving payment for her share, estopped her and her representatives from claiming any interest in the land; and that the sale of the lot under the decree was to be considered as conveying a good title to the whole lot, although it was not correctly described in such decree.¹

SEC. 421. There is a vast difference between standing by without taking measures to stop a sale and warning the purchaser, or even answering such questions as he may choose to put, and taking an active part in the transaction or inducing him to purchase by advice or persuasion. Good faith, generally, an excuse in the former case, is insufficient in the latter.² For in the latter case the owner is nearly if not quite in the position of a vendor, and cannot rely on the innocence of his assurances as a reason why they should not be made good subsequently,³ and in one case the court held that inducing one to buy, would estop the assertion of an after acquired title on the principle, similar to that which vests by descent or purchase in a grantor who has previously conveyed with warranty.⁴

SEC. 422. The estoppel does not apply where everything is equally well known to both parties, or where the party sought to be estopped was ignorant of the facts out of which his rights arose, or where the party seeking to conclude him

¹ *Garner v. Bird*, 57 Barb.

² *Davis v. Hardy*, 37 N. H. 65; *Colbert v. Daniel*, 32 Ala. 316; *Barnes v. McKay*, 7 Ill. 301.

³ *Wells v. Pierce*, 27 N. H. 301; *Hamilton v. Hamilton*, 4 Penn. 195; *Tilton v. Nelson*, 27 Barb. 295.

⁴ *Beaupland v. McKeen*, 28 Penn. 124.

was not influenced by the acts or admissions which are set up as the grounds of the estoppel.¹ To enable a man to set up a title by estoppel, the party must have been ignorant of the true state of the title at the time he took it, or been without means of ascertaining it by a reference to records.² When a man has encouraged another to settle on and improve land, and expend his money upon it, he will not be permitted afterwards to take it from him, although he has an older and better title, and acted himself in ignorance of his own right;³ but this applies only to a *bona fide* improver, who is led into a mistaken expenditure by the acts or connivance of another, supposing the property to be his own, and not where he knew the land to be in dispute between two parties, and volunteered to originate a new claim.⁴ A party who is not only present and acquiescing in what is done, but for a valuable consideration procures another to convey away his property, will be bound by the conveyance as though it were his own act.⁵ But, in Massachusetts, the estoppel is applied only where the party conceals an outstanding title.⁶

SEC. 423. Where a party, who has title to land by an unrecorded deed, makes himself instrumental in causing another to purchase it from a third person, he will be estopped from setting up his title as against such purchaser.⁷ Where the owner is informed of the sale of his property by another, on credit, and does not object to it, or gives the purchaser notice of his rights, but lies by and permits such purchaser to pay the purchase money, as it becomes due, to the vendor, and receives the whole or a portion of it from the vendor, he will be held to have sanctioned the sale, and will not be permitted to assert his title against the purchaser.⁸ If one

¹ Fletcher v. Holmes, 25 Ind. 469; Hill v. Epley, 31 Penn. 334.

² Wood v. Griffin, 46 N. H. 237; Gove v. White, 20 Wis., 430; Hill v. Epley, Sup.

³ M'Kelvy v. Truby, 4 Watts, & S. 323; Miller v. Miller, 60 Penn. 16; Goddefroy v. Coldwell, 2 Cal. 89.

⁴ M'Cormick v. M'Murtrie, 4 Watts, 195.

⁵ Burton v. Black, 32 Geo. 53.

⁶ Parker v. Barker, 6 Met. 423; Stevens v. McNamara, 37 Me. 178.

⁷ Mathews v. Light, 32 Me. 305.

⁸ Brewster v. Baker, 16 Barb. 613.

knowingly, though passively, or by looking on, suffers another to purchase and expend money on land under an erroneous opinion of the title, without making known his own claim, he is not permitted to exercise his right against such purchaser, it being a principle in equity, that if a man will stand by and see a person make expensive erections on land claimed by him, and give no notice of his claim, he will be enjoined from afterwards making claim to the same, to the injury of such person.¹ It seems, also, to have been adopted as a principle of law, that where one stands by and suffers another to purchase land to which he has a title, and expend money thereon, under an erroneous impression that he has acquired a legal title thereto, and does not disclose his own, he shall be estopped to claim the land²—provided he is himself cognizant of his own legal rights.³ Thus, where the defendants, owning the lower of two wing dams in a river, by means of which they could flow back upon the upper one, and, having a right to do so, suffered the purchaser of the upper dam, who did not know of this right, to go on and make expensive improvements upon the works at the upper dam, without making known their claim of a right to obstruct these works, although they saw the upper owners making these expenditures, they were estopped to flow back and injure the upper works.⁴

SEC. 424. Where, in an action to recover damages of the defendants, for causing the water to flow back upon premises, occupied by the plaintiffs, by the erection of a dam, it appears that both the defendants and their ancestor had failed to claim title to the premises, although they knew that they belonged to them, and that the plaintiffs had bought them, and were making valuable and permanent improvement thereon, believing that they owned them. Such silence and omission to assert title clearly constitute an estoppel, and no evidence could do away with the force

¹ Rangely v. Spring, 28 Me. 127; Crest v. Jack, 3 Watts, 239.

² Titus v. Morse, 40 Me. 348; Morrison v. Morrison, 2 Dana, 13; Pickard v. Sears, 6 A. & E. 469; Snodgrass v. Ricketts, 13 Cal. 359; Waters' Appeal 35 Penn. 526.

³ Junction R. R. v. Harpold, 19 Ind. 350.

⁴ Brown v. Bowen, 30 N. Y. 541.

of it.¹ The erection of permanent structures or buildings on land, with the consent and acquiescence of the owner, and in ignorance of his title, gives the person, who makes the expenditure all the rights of a purchaser, and he is protected both at law and in equity in the enjoyment of the fruits of his money or labor.² But in order to effect a result of this kind, there must be a fraudulent concealment of title, or a mis-statement of its true state distinguished from a mere promise that it shall not be enforced to the prejudice of the other party,³ on account of the provisions of the statute of frauds, heretofore mentioned in not reducing the agreement to writing, however equitable, the estoppel is to be made available and that creates one.

SEC. 425. The principles which estop a man from claiming what is conceded to be his own property, are highly penal in their character, and should not be enforced unless there is a concurrence of circumstances such as are necessary to the creation of an equitable estoppel.⁴ It must appear that he was acquainted with his title and wilfully concealed or mis-stated it, for it would be gross injustice in construing ignorance or misapprehension of the true nature of a right into a forfeiture of a power to enforce it.⁵ It should also be shown that the language or conduct of the owner was the direct motive or inducement to the outlay or expenditure of the person who purchased the land or made the outlay, so as to afford just ground for the inference that the wrong done by the former occasioned the loss incurred by the latter.⁶ Ignorance of the true state

¹ *Brown v. Bowen*, 30 N. Y. 541.

² *Stilles v. Cowper*, 3 Ark. 692; *Hamilton v. Hamilton*, 4 Penn. 195.

³ *Leland v. Gasset*, 17 Vt. 403; *Wilson v. Harwood*, 23 Me. 131; *Bachelor v. Sanborn*, 4 N. H. 474.

⁴ *Morris v. Moore*, 11 Humph. 433; *Boggs v. Merced Co.*, 14 Cal. 279; *Woods v. Wilson*, 37 Penn. 379.

⁵ *Tilman v. West*, 8 Ired. 83; *Royston v. Harris*, 15 Ala. 309; *Dixfield v. Newton*, 41 Me. 221; *Taylor v. Ely*, 25 Conn. 250; *Garrity v. Byington*, 12 Cal. 426; *Odlin v. Gove*, 41 N. H. 465; *McAfferty v. Conover*, 7 Ohio St. 99.

⁶ *Jones v. Cowles*, 26 Ala. 612; *Morton v. Hogdon*, 32 Me. 327; *Watkins v. Peck*, 13 N. H. 360; *Carpenter v. Stillwell*, 11 N. Y. 61; *Darlington's Appeal*, 37 Penn. 430.

of title on the part of the purchaser¹ must concur with wilful misrepresentation or concealment on that of the vendor. An attempt to deceive will be immaterial unless it has resulted in actual deception and consequent injury.² There is less difference between legal and equitable estoppels than might appear at first sight, and both ultimately rest upon the same principle.³

SEC. 426. A party may be estopped by his acts and declarations, if designed to influence the conduct of another, who relies upon the same and acts accordingly, although both were ignorant that what is thereby represented is not true. Upon the familiar principle that if one of two innocent parties must suffer, he through whose agency the loss occurred should sustain it. If one is induced to purchase an estate by the acts or representations of another, designed to influence his conduct, and creating a reasonable belief on his part, under which he acts, that he is thereby acquiring a valid title to the same, the party who should thus have influenced him, is estopped from setting up his own title, existing at the time of the purchase, against that of the purchaser. It is enough that the latter has been misled by the acts or declarations of the former, if they were intended to influence and did influence his conduct, although no fraud was designed.⁴ The language of Lord Campbell in defining what would constitute an estoppel, will furnish a broader and better rule than that which requires positive fraud as one of its essential elements: "If a party wilfully makes a representation to another, meaning it to be acted upon, and it is so acted upon, that gives rise to what is called an estoppel." "The party setting up such a bar to the reception of the truth, must show that there was a wilful intent

¹ *Ferris v. Coover*, 10 Cal. 507; *Crest v. Jack*, 3 Watts, 238.

² *Casey v. Inloes*, 1 Gill, 430; *Lawrence v. Brown*, 5 N. Y. 304; *Hill v. Epley*, 31 Penn. 331; *Goodson v. Beacham*, 24 Geo. 150.

³ *Jackson v. Waldron*, 13 Wend. 178.

⁴ *Morris Canal v. Lewis*, 1 Beasley, 323; *Waters' Appeal*, 35 Penn. 526; *Freeman v. Cooke*, 2 Exch. 663; *Cornish v. Abington*, 4 Hurl. & N. 549; *Jewett v. Miller*, 10 N. Y. 406; *McCune v. McMichael*, 29 Ga. 312; *Tilton v. Nelson*, 27 Barb. 595; *Blackwood v. Jones*, 4 Jones, (Eq.) 56; *Snodgrass v. Ricketts*, 13 Cal. 362; *Barnes v. McKay*, 7 Ind. 301.

to make him act on the faith of the representation, and that he did so act." And by "wilfully," as explained in *Freeman v. Cook*, "it must be understood, if not that the party represents that to be true which he knows to be untrue, at least that he *means* his representation to be acted upon, and that is acted upon accordingly."¹ But a disclaimer made to one who was not thereby influenced to rely upon it, and did not actually rely upon it in his acts, in such a manner that it would work a fraud upon him to have it denied or retracted, would not work an estoppel.² But where one, about to purchase a parcel of land, inquired of B. if he had any claim upon it, and he, by forgetfulness and honest mistake, informed the inquirer that he had not, when in fact he had, he was estopped to set it up against this purchaser who had acted upon the faith of his representation.³ And where a husband and wife were tenants by entirety, and, after his death, the estate was sold, and the widow, ignorant of her rights as survivor, and in good faith, encouraged a purchaser to bid for and take a deed of it, she and her heirs were held to be estopped thereby to set up a claim to the estate.⁴ In order, however, to work an estoppel *in pais*, the acts and declarations relied on must have been accompanied with an intention and design that they should be acted upon by the party who sets up the estoppel, and he must have acted upon them accordingly.⁵ Silence alone would not have that effect unless it were in itself fraudulent.⁶ As, for example, one knowing his title, should wilfully conceal it, and allow an innocent party to go on and be misled by his silent acquiescence.⁷ But if the party purchasing, in such a case, were cognizant of the facts, he could not avail himself of his ignorance or mistake in respect to their legal effect.⁸

¹ *Howard v. Hudson*, 2 E. & Black. 10; *Andrews v. Lyons*, 11 Allen. 349.

² *Carpenter v. Thruston*, 24 Cal. 283.

³ *Beardsley v. Foot*, 14 Ohio S. 416.

⁴ *Maple v. Kussart*, 53 Penn. 352.

⁵ *Turner v. Coffin*, 12 Allen, 401; *Brown v. Bowen*, 30 N. Y. 541; *Plumb v. Cattarangus Ins. Co.* 18 N. Y. 392; *Russell v. Maloney*, 39 Verm. 584.

⁶ *Maple v. Kussart*, 53 Penn. 352.

⁷ *Odlin v. Gove*, 41 N. H. 473.

⁸ *Tilton v. Nelson*, 27 Barb. 595; *Storrs v. Barker*, 6 Johns. Ch. 166; *Hobbs v. Norton*, 1 Verm. 136; *Hunsden v. Cheney*, 2 Verm. 150; *Raw v. Pote*, 2 Verm. 259; *Wood v. Griffin*, 46 N. H. 237; *Drew v. Kimball*, 43 N. H. 282.

SEC. 427. When a title has been once duly recorded no responsibility will arise from a failure to take further or immediate steps to warn subsequent purchasers, who may fairly be presumed to have taken the means pointed out by law, and acquired all the knowledge which it is important for them to have.¹ But this is applicable, only, in the case where the foundation of the estoppel is in silence or acquiescence, for when the owner concurs in a sale, by participating in it at the time, it becomes his own act, and he certainly cannot be allowed to make his own good faith a reason for throwing the loss upon third persons who are equally innocent. He will under such circumstances be estopped from asserting his rights, notwithstanding his ignorance of their existence at the time when the estoppel originated, and he will not be allowed to aver that he was under a misapprehension as to their nature or extent in point of law, unless he can show he was laboring under some want of knowledge or mistake of fact.² Constructive fraud will be as effectual as actual fraud in justifying any court in setting aside the provisions of the statute of frauds, and decreeing a trust without written evidence ; it is only where silence becomes a fraud, that it postpones. There is a wide difference between silence and encouragement, and a man who induces another to buy by positive assertion may be estopped, although free from any conscious purpose to deceive, on the general principle that as between two innocent parties the loss should be borne by him through whose act or omission it is due.³

SEC. 428. When one whose title is not recorded, and cannot be learned by the ordinary means of inquiry, lies by, for a considerable length of time, without warning others who are making expenditures on his land, under a confidence induced by a false show of title, equity will view his conduct as a fraud and grant relief to those whom his negligence has injured.⁴ Where a person holding a title to real estate,

¹ Fisher v. Mossman, 11 Ohio, 542; Knaupf v. Thompson, 16 Penn. 357; Hill v. Epley, 31 Penn. 331.

² Proctor v. Keith, 12 B. Mon. 252; Miller v. Miller, 60 Penn. 16.

³ Robinson v. Justice, 2 Penn. 19; Ormsby v. Ihmsen, 34 Penn. 462.

⁴ Woods v. Wilson, 37 Penn. 379.

who withholds his deed from record, and fails in any other manner to make known his right or title, but permits the grantor to claim ownership of the land and sell it to another, who takes possession thereof, under claim of ownership arising from such purchase, and erects thereon valuable improvements, with the knowledge and without any objection on the part of the real owner, the latter will, in equity, be estopped from afterwards setting up the title which he has so long concealed.¹

SEC. 429. It is difficult to draw the precise line how far positive fraud must enter into the act or declaration of the party who is sought to be estopped. But that it must have the same effect upon the party, who sets it up as an estoppel, is a rule well settled. The party will, in many instances, be concluded by his declarations or conduct which have influenced the conduct of another to his injury. The party, in such cases, is estopped from denying the truth of his admissions. But to the application of this principle with respect to title to property, it must appear, first, that the party making the admission by his declarations or conduct, was apprised of the true state of his own title; second, that he made the admission with the express intention to deceive, or with such careless and culpable negligence as to amount to constructive fraud; third, that the other party was not only destitute of all knowledge of the true state of the title, but of the means of acquiring such knowledge; and, fourth, that he relied directly upon such admission, and will be injured by allowing its truth to be disproved.² "The primary ground of the doctrine is, that it would be a fraud in a party to assert what his previous conduct had denied, when, on the faith of that denial, others have acted. The element of fraud is essential either in the intention of the party estopped, or in the effect of the evidence which he attempts to set up."³

¹ Foster v. Bigelow, 14 Iowa 239; Lucas v. Hart, 5 Iowa, 115; 2 S. Allen on Vendor's, 1022; Gatling v. Rodman, 6 Ind. 289, 1 Story Eq. § 381.

² Boggs v. Merced Co., 14 Cal. 367; Glidden v. Strupler, 52 Penn. 405.

³ Hill v. Epley, 31 Penn. 334; 1 story Eq. § 391; Adams Eq. 157; Copeland v. Copeland, 28 Maine. 539; Whitaker v. Williams, 20 Conn. 104; Delaplaine v. Hitchcock, 6 Hill, 17; Tolman v. Sparhawk, 5 Met. 475; Brewer v. Boston & Worcester R. R. Id. 487; McCracken v. San Francisco, 16 Cal. 626.

SEC. 430. The various circumstances which render the application of estoppel *in pais* necessary to titles of real estate being of so varied a nature that it is next to impossible to lay down positive rules regarding their application, it will therefore be necessary to illustrate the principle of this branch of estoppel by the citation of a variety of analogous cases, an estoppel *in pais*, where it applies is as effectual as a deed, but no more so; so that, if the party doing the act could not have made a deed of the land in question, his act cannot create an estate by estoppel in the same.¹ In the next place, a party who insists upon the acts of another as working an estoppel, must show that he acted upon the same, and that it formed the inducement which led him at the time to do what he did. Thus where an infant, whose land has been irregularly sold during his minority, made declarations after he became of age expressing his satisfaction of the sale; it was held not to be an estoppel to his claim to the estate, because being made long after the sale, it could have formed no inducement to the party to make the purchase.² But acts and declarations of a positive character, are not the only grounds of estoppel. Under some circumstances, one may by being silent or passive, when he ought to speak or act, estop himself from claiming his rights. Questions of this kind have most frequently arisen in cases where one, having a claim upon land, has stood by or knew of a sale of it being made as the property of another, without disclosing his claim. If a man holds a title to his lands by deed which has been duly recorded, it is all the notice he is bound to give so long as he remains passive;³ it is only when he sees another purchasing land upon which he has some unrecorded lien or charge, of which the other is ignorant, that he is bound to give notice thereof. And, upon failing to do so, he is estopped to set up such claim against the purchaser.⁴

¹ Lowell v. Daniels, 2 Gray, 169; Beaupland v. McKean, 28 Penn. 124.

² Ackley v. Dysert, 33 Penn. 176; Allen v. Allen, 45 Penn. 473.

³ Patterson v. Esterling, 27 Ga. 207; Fisher v. Mossman, 11 Ohio, St. 42; Tongue's Lessee v. Nutwell, 17 Md. 212; Hill v. Epley, 31 Penn. 332; Odlin v. Gove, 41 N. H. 477; Brinckerhoff v. Lansing, 4 John's ch. 70; Bigelow v. Topliff, 25 Verm. 287; Carter v. Champion 8 Conn. 554.

⁴ Gray v. Bartlett, 29 Pick. 193.

No man can set up another's act or declaration as the ground of an estoppel, unless he has himself been misled or deceived by such act or declaration, nor can he set it up, where he knew, or had the same means of knowledge, as to the truth of the statement, as the other party.¹ The same rule applies where the owner of land has stood by and allowed another to go on and make improvements upon it, in the mistaken belief that he was the owner thereof. If the true owner not only knows of such expenditures being incurred, but also that the other party is doing it under a belief that he owns the land, it is regarded as a fraud to suffer him to go on without notice, and he would thereby be estopped to claim the improvements, &c., and in some cases, even the land itself.² Thus where A. sold land to B. by parol, without giving any deed, and represented to C. that he had conveyed it to B., and thereupon C. purchased the estate of B. and made improvements upon it, it was held that A. was estopped to set up a title against C. on the ground that he had not made a deed to B.³

SEC. 431. An estoppel *in pais*, as affecting the title to land, can be better understood by referring to some of the following cases, in which similar questions were raised. In *Tilton v. Nelson*, a husband and wife having mortgaged an estate to loan commissioners, with a power of sale, the husband applied to them to make sale of it, and induced the officers of a bank, who held a judgment against him, to purchase the mortgaged estate for the purpose of satisfying their debt. The bank subsequently sold the estate. The sale being, for some reason, irregular on the part of the commissioners, the title defective, after the husband's death, his heir-at-law attempted to recover the land on that ground. It being shown that the father was cognizant of the facts, though not of their legal effect, and had induced the bank to purchase, as if the title was valid, he and all privy in es-

¹ *Ormsby v. Ihmsen*, 34 Penn. 472; *Gray v. Bartlett*, 20 Pick. 193; *McCune v. McMichael*, 29 Geo. 312; *Jewett v. Miller*, 10 N. Y. 406; *Ferris v. Coover*, 10 Cal. 589.

² *McGarrity v. Byington*, 12 Cal. 431; *Knoup v. Thompson*, 16 Penn. 364; *Gatling v. Rodman*, 6 Ind. 289; *Odlin v. Gove*, 41 N. H. 447.

³ *Key v. Dent*, 33 Ill. 316.

tate with him were estopped from setting up an adverse title. In *Storrs v. Barker*, the plaintiff's daughter, whose heir he was, made a will while *covert*, devising her real estate to her husband. The husband offered the land for sale, and the father, supposing the will to be valid, advised the defendant to purchase it, stating at the time that he had no claim to it. Subsequently the plaintiff ascertained that the devise, being that of a *feme covert*, was void, and claimed the estate. He was estopped to set up a title against one whom he had thus misled as to the true state of the title. In *Hunsden v. Cheney*, a son settled upon his wife, at marriage, a term, in the presence of his mother, stating to her that the same was to come to him at his mother's death. This, though done in his mother's presence and hearing, and being witness to the deed, was not denied by her—she did not then know that she had a claim to the term as a tenant in tail. She was thereby estopped to set up any greater estate in the term than one for her own life. In *Blackwood v. Jones*, one having a claim upon land was present at the sale, and, to an inquiry, stated that his claim had been settled, he was estopped to set up the same against the purchaser. In *Snodgrass v. Ricketts*, the true owner was estopped, where a sale was made by another in his presence, and the purchaser was instigated, by the one who had the title, to buy the land. In *Beaupland v. McKeen*, one who had been employed to purchase land for another, who bought and paid for the same, on the belief that he had obtained thereby a good title, was estopped to set up a pre-existing adverse title, which he had purchased after the purchase made by the tenant.

SEC. 432. The owner of lands through which a railroad passed, having previously granted the right of way to the company, was apprised when the agents of the company entered on his lands to open the road, and knew that they claimed the right under his deed, but raised no objection, and took a contract for supplying materials used in the construction of the road. He was estopped from afterwards bringing trespass against the members of the company, although the instrument by which he conveyed the right of way might be

inoperative as a deed.¹ Where a creditor has treated with the transferee of his debtor's property as the real owner, he is estopped from contesting the sale.² Where the party beneficially interested in lands sold under a deed of trust to secure a debt, the sale of which was voidable, because the lands were put up in lump, subsequently induces a third party to purchase the lands from the vendee at the trustee's sale, he cannot attack the validity of the sale.³ The defendant having settled on and inclosed a vacant lot, told the owner that he would give it up when his family came. Afterwards, he wanted to fence with boards, and it was agreed that he should do so, and that the owner should pay one-half of the expense; and at other times he recognized the owner's title. In ejectment by such owner's vendee, the defendant was estopped from disputing the owner's title.⁴ Where the plaintiff had lived, for nearly twenty years, near the land, and had made no claim for his share of it, nor given any notice of his title, though aware that others were making valuable improvements upon it on the faith of their titles, he is estopped from asserting title in himself, as against purchasers ignorant of his title and without notice.⁵

SEC. 433. When the circumstances are such as to give rise to an equitable estoppel, it will be binding on all who acquire title subsequently, with notice or knowledge from the party estopped.⁶ Although in the absence of notice, the legal title must prevail where the title to land is in question.⁷ Generally speaking, estoppels of this description are limited to parties to whom the declaration was made, or the assurance given, but the courts have also enforced them against third persons.⁸ And in one case,⁹ the acquiescence of the grantee in an exclusive right of way in its use by others,

¹ Pollard v. Maddox, 28 Ala. 321.

² Ross v. Pritchard, 15 La. An. 531.

³ Taylor v. Elliott, 32 Miss. 172.

⁴ Downer v. Ford, 16 Cal. 345.

⁵ Woods v. Wilson, 37 Penn. 379.

⁶ Shaw v. Beebe, 35 Vt. 204.

⁷ Price v. Case, 10 Conn. 375.

⁸ Robinson v. Justice, 2 Penn. 19; Keeler v. Van Tuyle, 6 Penn. 250.

⁹ Lewis v. Carstairs, 6 Wheaton, 193.

and his calling upon them to contribute to keep it in repair, were held to create an estoppel in favor of a third person, who might be presumed to have been influenced by the course thus pursued in paying, although there was no evidence that it had been brought to his knowledge. There is no better settled principle of law than, that the express, or even tacit acquiescence, of the owner in an unauthorized sale of chattels, will estop him from questioning the title of the purchaser,¹ and it has even been applied where a failure to inform a purchaser on credit of the real state of the title, and thus put him on his guard against paying the purchase money.² Whether the acts, admissions or declarations constituting the estoppel are contemporaneous with or prior to the sale, makes no difference if they tended to deceive, and the buyer was actually misled.³

SEC. 434. Upon a sale on execution, if the debtor acts in selecting appraisers, and in giving directions to the marshal concerning the mode of sale, and these facts are known to the purchaser when he buys and pays for the property, the debtor is estopped from avoiding the sale, by showing that the marshal had not taken the necessary steps to authorize him to sell.⁴ Even where no judgment of foreclosure has been entered, yet if the mortgagee has admitted in writing the whole mortgage debt to be due, and by his signature and acts to forward and expedite the master's or sheriff's sale of the mortgaged premises, waiving matters of form, surrendering possession to the purchaser, and moving away, or standing by and suffering purchasers for large and valuable consideration, to improve the property, he is equitably estopped from asserting his ownership for want of proper authority, at the time in the master or sheriff to sell.⁵ Where land is incumbered by a judgment, and the owner of it allows a purchaser to acquire a title to it at a sheriff's sale on execution when he could have restrained the sale by an

¹ *Thompson v. Blanchard*, 4 N. Y. 303; *Cox v. Burk*, 3 Strobb. 367.

² *Thompson v. Sanborn*, 11 N. H. 201.

³ *Quirk v. Thomas*, 5 Mich.; *Robinson v. Justice*, 2 Penn. 19.

⁴ *Erwin v. Lowry*, 7 How. 172.

⁵ *Cromwell v. Bank of Pittsburg*, 2 Wall, Jr. C. C., 569.

equity superior to the judgment, he cannot then claim title to the land as against the purchaser, where such claim, if sustained, would also result in a loss of the purchase money to such purchaser.¹

SEC. 435. In order that an equitable estoppel may arise to debar the owner, the concealment must be fraudulent, or attended by such gross negligence and indifference to the rights of others as to be equivalent to actual and premeditated fraud.² What shall be sufficient concealment or false representation to create the estoppel, is a matter depending in a great measure on the circumstances of the case. While it has been well established in estoppels by record and by matter of writing, or by deed, what is necessary to create either, there have been no particular rules established or adopted in regard to the nature and amount of proof or circumstances necessary to create an equitable estoppel. Every case in which this branch of the law of estoppel is applicable must therefore depend upon the peculiar circumstances connected with it; but some degree of moral turpitude is indispensably necessary to give mere silence or acquiescence, the force of a peremptory estoppel.³ Good faith and diligence must concur on one side, with the want of them on the other, and no estoppel can arise in the absence of actual fraud, unless the purchaser was destitute not only of actual knowledge of the true state of the title, but of a means of acquiring knowledge by a recourse to the record,⁴ or in any other manner equally obvious or certain;⁵ for under such circumstances both parties will be regarded as equally negligent, and it would be wrong to relieve one at the cost of enforcing a forfeiture against the other.⁶

¹ Frost v. Quackenbush, 18 Abb. 3.

² Parker v. Barker, 2 Met. 421.

³ Titus v. Morse, 40 Me. 348; Colbert v. Daniel, 32 Ala. 314; Hill v. Epley, 31 Penn. 331; Clabaugh v. Byerly, 7 Gill. 354.

⁴ Bigelow v. Topliff, 25 Vt. 273; Carter v. Champion, 8 Conn. 554.

⁵ Hill v. Mossman, 11 Ohio S. 42; Odlin v. Gove, 41 N. H. 465.

⁶ East India Co. v. Vincent, 2 Atk. 83; Gray v. Battell, 20 Pick. 86; Casey v. Inloe, 1 Gill. 430; Tongue v. Nutwell, 7 Md. 212; Knapp v. Thompson, 16 Penn. 502; Carpenter v. Stillwell, 11 N. Y. 61; Clabaugh v. Byerly, 7 Gill. 354.

SEC. 436. A man cannot deny the validity of a sale made by a person whom he has enabled to hold himself out to the world as the owner, or duly authorized to sell.¹ In order to produce this result, there must be fraud or neglect on the part of the owner, as well as good faith on the part of the purchaser.² When A., with a view to hinder and delay his own creditors, falsely and fraudulently holds out to the public and pretends that certain chattels bought and paid for by him, and then in his possession, belong to B., who has the lease of the store where the articles are sold, and whose name is upon the awning, he will be precluded from claiming the property as against the creditors of B., who seize the property upon their executions.³ Where the owner of goods stands by and allows another to treat them as his own, by which means a third person is induced to purchase them, the former cannot recover them from the purchaser; and if one by his conduct causes another to believe in the existence of a state of facts, or by his silence admits another to be the owner of property, when such ownership is asserted, so that a third person, in acting upon it, assumes a responsibility or parts with the property, he cannot afterwards aver his own title to the injury of such person.⁴ If, after an alleged purchase of goods, the vendees cause an execution to be levied upon them as the property of the vendor, this is a solemn admission on their part that the goods were, at the time of the levy, the property of the vendor, and they are estopped from claiming the goods in any other way than by virtue of the said levy, even where it was proven that they did not intend to abandon their alleged purchase, and acted under the advice of counsel that their title would not be affected thereby.⁵ The owner of goods, who stands by and voluntarily allows another to treat them as his own, whereby a third person is induced to buy them *bona fide*, cannot re-

¹ Pickering v. Bust, 15 East, 38; Davis v. Bradly, 24 Vt. 35; Dyer v. Pearson, 3 B. & C. 38; Reed v. Vancleve, 3 Dutch, 352; Carmichael v. Buck, 1 Rich. Eq. 332.

² Faucett v. Osborn, 32 Ill. 41; Dyer v. Pearson, 3 B. & C. 38.

³ Rigney v. Smith, 34 Barb. 383.

⁴ Hibbard v. Stewart, 1 Hilt. 207.

⁵ Field v. Langsdorf, 43 Mo. 32.

cover them from the vendee. Thus the plaintiff, the owner of the fixtures of a public house, demised them to A., who thereupon became tenant of the house to B., under an agreement which gave his landlord a lien on the fixtures, the plaintiff being present at the execution of such agreement. A. afterwards sold the good will and fittings, without the plaintiff's knowledge or assent, to the defendant, who, being told by B. that A. was his tenant, bought them *bona fide*, in ignorance of the plaintiff's title, and was accepted by B. as a tenant in the place of A. Held, that he was estopped in an action to recover the fixtures.¹

SEC. 437. So where one of several administrators was present at a levy upon the property of his intestate, and furnished to the officer a list of the slaves, and was present at the sale, and made statements to the bidders; although it did not appear that he acted fraudulently, the administrators were estopped from proceeding against the officer as a trespasser.² So the plaintiffs agreed with A. to sell to his firm fifty casks of potashes, for a certain price, cash on delivery. A. engaged freight for the potashes in a ship, advertised for a voyage to Liverpool. The plaintiffs sent the potashes on board by their carman, who took receipt therefor from the mate. A. then went to the office of the plaintiffs, and stole the receipts from their desk. On the same day he presented them to the owners of the ship, and procured a bill of lading in his own name. Drawing a bill of exchange against the shipment, he assigned the bill of lading to B., who, in good faith, made an advance upon the security. C., the master of the ship, refused to deliver the potashes to the plaintiffs, but delivered them to the holders of the bill of lading in Liverpool. The plaintiffs gave no notice of the theft to any one connected with the ship for two or three days. In the meantime they treated with A., and demanded from him pay for the potashes or their return. In an action against C. and A., and his partners to recover the potashes, held, that the conduct of A. in obtain-

¹ Gregg v. Wells, 10 Ad. & Ell. 99; Francis v. Welch, 11 Ircl. 215; Downer v. Flint, 2 P. Wms. 527.

² Ponder v. Moseley, 2 Florida, 207; Ackley v. Newville, 25 Cal. 551.

ing possession of the property was *fraudulent* rather than *felonious*; and, the plaintiffs having allowed him to assume some of the *indicia* of ownership, so as to justify C. in considering him the lawful owner, and having also neglected to notify C. of the fraud promptly they could not recover from C.¹

SEC. 438. So where A. sold by contract to B. 100 casks of tallow then lying at a wharf, and on the same day gave him a written order to the defendants, the wharfingers, "to weigh, deliver, transfer and re-house the same." The next day B. who had previously entered into a contract with the plaintiffs for the sale of 300 casks of tallow, in part fulfilment of that contract, obtained from the wharfingers and sent to the plaintiffs the following acknowledgment: "Messrs. C. & Co., we have this day transferred to your account (by virtue of an order from B.) 100 casks tallow, &c., with charges from 10th October." Upon the receipt of this, the plaintiffs paid B. the full amount of the tallow. Shortly afterwards the defendants delivered twenty-one of the casks to the order of the plaintiffs. On the 11th of October, B. stopped payment, and on the 14th, A. sent notice to the defendants not to deliver the remainder of the tallow to B. or his order; and though the tallow had not been weighed, held, the defendants were estopped by their acknowledgment, and could not set up in defence a right in A. to stop *in transitu*.² The defendant, a wharfinger, having acknowledged certain timber on his wharf to be the property of the plaintiff; held that he could not dispute the plaintiff's title.³ A manufacturer deposited goods with a wharfinger at Stockton, for the purpose of being shipped from the defendants wharf in London, receiving from him receipts describing them. The plaintiffs sent the receipts and delivery orders to the defendants, and demanded the goods. The defendants stated that the goods had not arrived, but promised that when they did arrive they should be forwarded to the plaintiffs; the defendants having thus assented to the plaintiffs title could *not* afterwards dispute it.

¹ Brower v. Peabody, 18 Barb. 599.

² Hawes v. Watson, 4 Dowl. & Ry. 22.

³ Gosling v. Birnie, 7 Bing. 339

SEC. 439. The expenditure of money or labor by one man on the land of another, under a license given by the owner, will estop the owner from revoking the license and wresting the former from his possession of the land.¹ Where a licensee has expended money on the faith of the license, and put himself in a position that he would be seriously damaged by allowing it to be revoked, the estoppel is applied in the same manner as it is to those cases of acquiescence and silent consent.² A parol license, when executed, may become an easement on the land, and where acts have been done in reliance upon a license, the licensor will be estopped from revoking it to the injury of the licensee.³ This rule, that a license to do something on the licensor's land, followed by expenditure on the faith of, is irrevocable, rests upon the principle of estoppel, because the parties cannot be placed in *statu quo*. Equity treats a license thus executed as a contract giving an absolute right.⁴ A license cannot be revoked or withdrawn, as long as it is essential to the possession or enjoyment of a vested right or interest, which has been created by the licensor, placed, with his assent, where the continuance of the license is essential to its enjoyment. This is a branch of the rule that no one can withdraw a promise or declaration, made with a view of inducing others to act, after they have acted upon it, and thus placed themselves in a position where they must necessarily suffer, if it be withdrawn.

SEC. 440. There is a vast and apparent distinction between a refusal to fulfil an executory contract, and the destruction or deprivation of a right, which has actually vested. No man is allowed to keep the property of others, by inducing them to place it upon his soil and then refusing a right of entry to regain it. The estoppel is properly applied, and without divesting the title to land, prevents its being used as a means of injustice. Whenever a party has induced another

¹ Dyer v. Cannall, 4 Penn. 353; Bridge Co. v. Bragg, 11 N. H. 702.

² Rhodes v. Otis, 33 Ala. 578.

³ Dark v. Johnson, 56 Penn. 161.

⁴ Huff v. McAuley, 53 Penn. 206.

upon the faith of his promise, though verbal, to expend money or labor, for which he can only be remunerated by the enjoyment of the thing so promised, equity will compel the promisor to give such deed or writing as shall be requisite to secure the possessor in the enjoyment of what was promised and in those states where there are no courts of equity to compel such things to be done. Courts of law consider the thing as actually done, and the grantee will accordingly be protected in the enjoyment of the thing promised.¹ This principle has a much wider range in equity, which draws the line between participation and inducement, in the shape of assurances, or mutual promises and mere acquiescence,² and enforces agreements which have been so far executed by an actual transfer of possession, as to put their existence beyond question, and renders it difficult to restore the parties to their actual position, without injustice, and a license which has been acted upon, falls directly within this principle, and stands in the same position with other executed agreements.

SEC. 441. The principle on which chancery precludes men from falsifying hopes or expectations, on which others have acted, now forms one of the most prominent doctrines of the common law, under the title of equitable estoppel, and enables a court of law to do that indirectly, which would otherwise fall clearly beyond the scope of their powers. When a thing sold or given, is at the time on the land of him who gives it, he will be estopped from defeating his own grant, by refusing the grantee permission to enter on the land for the purpose of carrying the gift away. An executed license stands on the same footing at law, as an executed parol agreement in equity, and is equally irrevocable, whether lands or chattels are in question.³ The estoppel is limited by the purpose for which it is called into being, and will be extended as far as the exigencies of the case and the purposes of justice require.

¹ McKellip v. Mellhenny, 4 Watts, 317; Swartz v. Swartz, 4 Penn. 353.

² Wells v. Pierce, 27 N. H. 503.

³ Woodbury v. Paisley, 7 N. H. 237; Sheffield v. Callis, 3 Geo. 82; Wilson v. Chalfant, 15 Ohio. 241; Clement v. Durgin, 5 Me. 9; Androscoggin Co. v. Bragg, 11 N. H. 102; Pope v. Hay, 14 Vt. 560.

SEC. 442. An estoppel *in pais* can only be set up as a means to prevent injustice.¹ And not when a person through misapprehension, ignorance or inadvertence, does acts or makes declarations that mislead another to his injury, but where at the same time there is no wilful deception or culpable negligence, and no intention that the representation should be acted upon as true by the other party, and nothing that is equivalent to a promise that the representation is true.² It must appear that there was fraud or gross neglect; that the party making the admission, by his declaration or conduct, was apprised of the true state of his own title; and that others were acting in ignorance of it; that he intended to deceive or was culpably negligent in the non-assertion of his rights; that the other party had no knowledge, or means of acquiring knowledge, of the true state of the title, and that he relied upon such admission to his injury.³ The declarations must have been the main inducements of the purchase.⁴ Representation or silence must not only have misled, but have been intended so to mislead; or at least there must have been such culpable negligence or carelessness as amounts to such intention. Reasonable care on the one side or negligence on the other, will not estop.⁵ The circumstances must be such, in case of silence, as to render it the duty of the party to speak. But it has been held that there can be no verbal estoppel,⁶ none by a contract invalid under the statute of frauds.⁷ And not by a parol promise of which there can be no specific performance.⁸ The cases cited will serve in a measure to illustrate the rules adopted and the manner in which estoppels *in pais*, or technically

1 Thomas v. Bowman, 29 Ill. 426.

2 Danforth v. Adams, 29 Conn. 107.

3 Boggs v. Merced Co., 14 Cal. 279; Junction R. R. Co. v. Harpold, 19 Ind. 347; Woods v. Wilson, 37 Penn. 379; Brewer v. Boston, &c., 5 Met. 478; Brubaker v. Keson, 36 Penn. 519; Calif v. Hillhouse, 3 Min. 311.

4 Duell v. Bear, &c., 5 Cal. 84; Wooley v. Edson, 35 Verm. 214; Austin v. Thompson, 45 N. H. 113; Hazleton v. Batchelder, 44 N. H. 49; Calif v. Hillhouse, 3 Min. 311.

5 Taylor v. Ely, 25 Conn. 250; Turner v. Coffin, 12 Allen. 401; Plumer v. Lord, 9 Id. 455.

6 Hamblin v. Hamblin, 1 Appl. 141; Stinchfield v. Emerson, 52 Maine. 465.

7 Miranville v. Silverthorn, 48 Penn. 117.

8 Wright v. DeGraff, 11 Mich. 164.

speaking, equitable estoppels, have been and are applied to questions concerning the title to real estate and personal property. The rules in regard to estoppels by deed will, as we have already noticed, be found to be more uniform and systematic in regard to their use and application.

CHAPTER XVI.

THE APPLICATION OF EQUITABLE ESTOPPELS
TO INSTRUMENTS NOT UNDER SEAL.

NOTES, BILLS, BONDS, CONTRACTS, DEBTS, ETC., ETC.

SECTION 443. The application of this branch of estoppels, under the principle of commercial jurisprudence, is attended with as much of the same harshness and rigor, which were applied to technical or legal estoppels, under the common law. The distinction between legal and equitable estoppels, is forcibly illustrated in their application to obligations, under seal for the payment of money. In this country, the estoppel attached by the common law to sealed instruments, has been to so great extent destroyed or modified by statute or custom, as to permit fraud or a failure of consideration to be pleaded or given in evidence, as a defence to an action brought upon a speciality. But the modern decisions have established another important change in the application of the estoppel to this effect. That if such an instrument be purchased by a third person, in consequence of a statement by the covenantor or obligor that he is liable to pay it. The admission operates and precludes him from controverting it, and setting up a defence in a suit brought for the benefit of the purchaser, which would have been available against the assignee. Thus, while the common law estoppel of a declaration of debt, solemnly made under seal to the obligee, has been to a great extent done away with. A subsequent parol promise or statement to an assignee, has in lieu of the common law estoppel, become binding and acquired the conclusive force and effect which the former has lost.¹

¹ Watson v. McLaren, 19 Wend. 557; Holbrook v. Burt, 22 Pick. 546; Decker v. Isenhauer, 1 Penn. 476; Davis v. Thomas, 5 Leigh. 1; Brown v. Wright, 17 Ark. 9.

SEC. 444. As regards the application of the estoppel, there is no difference whether the debt assigned is a simple contract debt or one under seal, the debtor is estopped from taking advantage of any defence that was concealed or withheld from the assignee.¹ It is a universal rule that estoppels shall not be extended by implication or intendment. But as regards this class of estoppels, the rule is not applied with the rigor and strictness, with which it is to estoppels by record and deed. Courts are inclined to extend rather than restrict their operation of this class of estoppels in their application to mercantile transactions, where men are to a great extent compelled to trust to appearances. The estoppel must, however, be limited within such bounds as are sufficient to place the party who has dealt on the faith of appearances to turn out to be incorrect, in the same position with reference to the author of such appearances as if they were really true. The utility of this class of estoppels has met with great favor by courts, while they have been hostile to their technicality. Perceiving how necessary and essential it is to the easy and rapid transaction of business, that one man should be able to put faith in the conduct and representations of his fellow man. The courts have almost uniformly decided and established the principle that such representations and conduct shall be binding and conclusive, in cases where a mischief or injustice would be caused by treating them in effect as revocable, while they are unwilling to allow men to be inveigled by former statements and admissions, which are regarded as unimportant when made, which neither deceive or induce any one to alter their position. Such estoppels are regarded and held to be as odious as they were formerly.

SEC. 445. These estoppels arise where a party by his words or conduct wilfully causes another to believe in the existence of a certain state of things, and induces him to act on that belief and alter his own previous position. A party who so acted is estopped and precluded from falsifying his

¹ Plant v. Voeghm, 30 Ala. 160; Powers v. Talbot, 11 Ind. 1; Forsythe v. Day, 46 Me. 176; Buckner v. Coleote, 28 Miss. 432; Homer v. Johnson, 5 Howard, 698.

own representation. "By the term wilfully," observes Parker, B., "we must understand, if not that the party represents that to be true which he knows to be untrue, at least that he means his representation to be acted upon and that it is acted upon accordingly, and if, whatever a man's real intentions may be, he so conducts himself that a reasonable man would take the representation to be true, and believe that it was meant that he should act upon it, and he did act upon it as true, the party making the representation would be equally precluded from contesting its truth." If one party dealing with another puts forth a sealed instrument as his deed, or if he represents it to be a binding obligation which he has himself executed, he cannot be heard in any court of law or equity to say, as against a party who has dealt with him on the faith of the correctness of the representation, that the instrument is not his deed, or that he never executed it; or that it is not a binding obligation.

SEC. 446. Any act of the principal which estops him from setting up a defense personal to himself, operates equally against his surety. Where the principal maker of a promissory note not governed by the law merchant, was informed by a person that the latter was about to purchase said note, and would do so if it was good, and if there was no defense to it, and said principal thereupon informed such person that the note was good, that there was no defense to it, and that it would be paid to such person if he should purchase it, and, by reason of such representations, such person thereafter purchased the note, and the same was assigned to him. In a suit on the note by a subsequent assignee of such purchaser, the principal and his sureties were estopped from setting up a defense, personal to the principal, existing at the time of said representations.

SEC. 447. An unqualified assurance by a debtor that he has no defense, or that the debt will be paid, will enure as a new contract, and is equally binding, whether it is made under a mistaken impression or with a fraudulent design to conceal the truth from the assignee.¹ Such an estoppel arises where the representations are recklessly made, with-

¹ Elliott v. Clelan, 1 Penn. 54; McCabe v. Roney, 32 Ind.

out knowing or inquiring into the real state of the case.¹ A man who acts or speaks in a way to influence the conduct of others, cannot escape from the responsibility, on the ground that he had no intention to mislead, and believe what he uttered to be true. When language is ambiguous, and spoken in a double sense, the meaning should be preferred which it was meant to have in the ears of those to whom it was addressed.² Every one who participates in the sale of a bond or note, or takes an active part in inducing another to become a purchaser, will be bound by what he does or says in the course of the transaction, whether it results from mistake or from any other cause, while his acts and declarations will be weighed, and not interpreted as meaning more than they import.³ The purchase of a debt on the faith of an admission by the debtor of his liability to pay for it, deprives him of the right of making any defence to any suit which may be brought subsequently on behalf of the purchaser.⁴

SEC. 448. Where a surety signs an instrument apparently perfect and complete, and hands it to his principal, to be finally delivered to the obligee, only when it shall have been executed by certain others as co-sureties, and the principal, without complying with the condition, delivers the instrument to the obligee, who has no notice, actual or constructive of the condition and takes the instrument in good faith, such surety will be bound. When a debtor wilfully admits a greater liability than actually exists, or conceals the equity or defense on which he subsequently relies, such concealment or admission is absolutely conclusive in favor of the assignee, if acted on by him in accepting the assignment.⁵ A debtor will not be prejudiced by failing to state a defense of which he is ignorant,

¹ *Preston v. Manny*, 25 Conn. 158; *Smith v. Stone*, 17 B. Mon.

² *Wheulton v. Hardesty*, 8 Ellis & B. 232.

³ *Cambridge v. Littlefield*, 6 Cush. 210.

⁴ *Sloan v. Richmond Co.* 6 Blackfd. 176; *Williams v. Parker*, 6 Corter, 230; *Crout v. DeWolf*, 1 R. I. 393; *Swanson v. Walker*, 3 Tex. 93.

⁵ *Jones v. Hardisty*, 10 Gill & Johnson, 404; *Sands Adm'r. v. Lacoste*, 5 How. 471; *Decker v. Eisenhauer*, 1 Penna. R. 476; *Sargant v. Sargant*, 18 Vermont, 371; *Foot v. Ketchum*, 15 Id. 258; *The Middleton Bank v. Jerome*, 18 Conn. 443; *Watson's Exr's. v. M'Laren*, 19 Wend. 557; *Petrie v. Fleter*, 21 Id. 172.

nor unless his statements are valid and acted on by the assignee in taking the assignment. No admission, however formally or solemnly made can be binding on the debtor, without specific proof that it has injured or prejudiced the assignee.¹ Where the assignee of a judgment purchased it in good faith, relying upon the statement of the defendant that no part of it had been paid, when in fact a payment had been made by the defendant to the plaintiff, before assignment, the defendant cannot as against the assignee, set up such payment as a discharge of so much of the judgment, nor by confessing a second judgment to another creditor, can he enable the latter to attack the first judgment in the hands of such assignee for the same cause.²

SEC. 449. In the case of equitable estoppels the burden of proof is on those who seek to shut out evidence which is *prima facie* admissible, or exclude a defense which is valid under the ordinary rules of law; and they must show, in order to be successful, not only that the debt or demand assigned was admitted to be good, but that the assignment was accepted on the faith of the admission. The admission must not only be contemporaneous with and precede the assignment, but must be made directly to the assignee, or in such a manner as to justify the inference that it was meant to reach his ears and induce him to become a purchaser of the debt.³ The transfer must be for value and not a gift or benefaction.⁴ Although value may be given by surrendering an antecedent security or obligation.⁵ In order that the principles of equitable estoppels may be made applicable to instances like those above cited, it is not necessary that the admission be made in express terms. It is sufficient if the language or conduct of the debtor is such as to lead the assignee to believe the debt is valid and may be purchased with safety. A man standing by and seeing an instrument from which he has been discharged transferred to another as

¹ Hall v. Parmlee, 2 Md. ch. 137; Weaver v. Lynch, 25 Penn. 449.

² Rae v. Lawson, 18 How. Pr. 23.

³ Elder v. Hazlett, 35 Ohio, 107; Martin v. Richter, 2 Stockton's Ch. 510; Lounsbury v. Depew, 28 Barb. 111.

⁴ Weaver v. Lynch, 25 Penn. 449.

⁵ Boyd v. Cumming, 17 N. Y. 101; Roxborough v. Messick, 6 Ohio S. 448.

a valid and existing obligation, is as much bound as if he had taken an active part in the transaction.¹

SEC. 450. Where a maker of a note by himself or agent represents to a person about to take an assignment of the note that it is a valid obligation, that he has no defense to it, he cannot in action brought by the assignee on the note plead a failure of consideration.² And where a note is transferred to a creditor for an antecedent debt who takes it upon the statement of the maker, he is estopped to deny its validity.³ The maker of an accommodation note by delivering it to the payee invests him with the character of a creditor, and if a third party in the belief that such note is given for actual indebtedness, from the makers to such payee, at the solicitation of the latter, and to enable him to negotiate it, signs such note. The maker after paying the note is estopped from claiming contribution from him.⁴ A party who intrusts a blank acceptance to another, who fills in a larger amount than that fixed by the acceptor as a limit, and procures it to be discounted by a bank, which acts in good faith and without notice of fraud upon the acceptor, estops the acceptor in an action upon the bill by the bank from setting up fraud or forgery as a defense to it.⁵ If the maker of a promissory note tells one seeking to trade for it, and desirous to know whether he has any defense against it, that it is "all right," he will not be permitted afterwards to dispute this admission when sued on the note. It is such an admission as estops the maker from denying that the note is all right, if the facts upon which the subsequent defense is rested, existed at the time of making such admission. Such admission is good against the maker of the note, if it be negotiable, not due, and unprotested, whether it be false or true, or fraudulent or innocent, if it is made so as to have a tendency to mislead or deceive, and has that effect.⁶ Declaring a note to one about to purchase

¹ Cambridge Inst. v. Littlefield, 6 Cush. 210.

² Vanderpool v. Drake, 28 Ind. 130; Williams v. Jackson, Id. 334.

³ Foster v. Newland, 21 Wend. 94.

⁴ Melms v. Weiderhoff, 14 Wis. 18.

⁵ Vanduzer v. Howe, 21 N. Y. 531.

⁶ Wright v. Allen, 16 Ind. 284; Brooks v. Martin, 43 Ala. 360; Clements v. Loggins, 2 Cal. 514; Rose v. Teeple, 16 Ind. 37.

it to be good, or standing by in silence when it is transferred for a consideration, is an estoppel *in pais* against a debtor.¹

SEC. 451. A person to whose order a bill or note is made payable, is generally vested with the right to transfer the same by indorsement, and the maker or acceptor cannot dispute the power of the payee to indorse and transfer the instrument. The making or accepting of it is an assertion to all the world of the competency of the payee to negotiate and transfer the paper, and they are estopped from afterwards gainsaying the assertion so made. One who transfers a negotiable instrument by delivery, or by indorsement impliedly guarantees that it is genuine, and that he has title to it.² Thus, where one of the members of a firm drew a bill payable to the order of a third party, payable ten days after sight, the bill was delivered with the forged indorsement of the payee and that of a second indorser thereon, to a bank in Utica, which discounted the bill, indorsed and sent it forward for collection. The drawee after having accepted and paid the bill, discovered it was a forgery, brought an action against the bank, to whom he had made the payment, to recover back the amount paid, he was held to be estopped, because the drawers delivering the bill with the name of the payee indorsed upon it, affirmed that the indorsement was genuine, and that it might be negotiated by delivery, and because such a bill, when transferred by the maker, indorsed in this manner, is in effect payable to bearer. So if a party whose name has been forged to a note, promises to pay it, he adopts the signature as his own and is estopped from pleading that as a forgery.³

SEC. 452. Although an accommodation note is invalid in the hands of the person for whose benefit it was made, still, if it is transferred as business paper, at a usurious discount, to a *bona fide* purchaser, the payee is estopped from setting up usury as a defense against his liability on the note.

1 Petrie v. Filter, 21 Wend. 172; Davis v. Thomas, 5 Leigh 1.

2 Herrick v. Whitney, 15 Johns. 240; Nuny v. Judah, 6 Cow. 484; Morrison v. Cune, 4 Duer, 79.

3 Goggill v. Am. Ex. Bank, 1 N. Y. 113; Erwin v. Downs, 13 N. Y. 575; Prescott v. Calverly, 7 Gray, 407.

Where the maker, endorser, drawer, or acceptor of negotiable paper represents the same to have been made, endorsed, or accepted for value, and the same is purchased or taken on the strength of those representations, he is estopped from showing the contrary.¹ The rights of the endorsee thereon are the same against the parties so representing it, as if it had been in fact business paper.² When an endorser of a note commits it to the maker with the date in blank, the note carries on the face of it, an implied authority to the maker to fill up the blank, as between the endorser and third persons, the maker, under such circumstances, must be deemed to be the agent of the endorser, and as acting under his authority and with his approbation. In like manner, where a person endorses his name upon a piece of blank paper, and delivers it to another for the purpose of giving him a credit, the latter is authorized to write on the other side a promissory note payable to the order of the endorser.³ Such a blank endorsement is, in effect and intention, a letter of credit, and being made with the intent that a promissory note shall be written on the other side of it, it does not lie with the endorser to say that he did not endorse the note. A party who makes a blank acceptance, or signs his name on a blank paper and delivers it to another person, to be over written with a note, gives an implied authority to fill up the instrument, and he is liable thereon to the party receiving it honestly and for value, though filled up for a larger amount than was actually authorized, and in a different manner.⁴ The vendor of a promissory note who transfers it by endorsement, impliedly warrants that the signatures of the prior parties, whose names appear thereon, are genuine, notwithstanding the endorsement is expressed to be without recourse to him.⁵

¹ *Benedict v. Caffé*, 5 Duer, 226; *Robbins v. Richardson*, 2 Bosw. 248.

² *Burrell v. Degroot*, 5 Duer, 379; *Chamberlain v. Townsend*, 26 Barb. 611; *Middletown Bank v. Jerome*, 18 Conn. 413.

³ *Violett v. Patten*, 5 Cranch, 151.

⁴ *Griggs v. Howe*, 31 Barb. 100; *Vanduzen v. Howe*, 21 N. Y. 531; *Young v. Ward*, 21 Ill. 223; *Goodman v. Simons*, 20 Howard, 361.

⁵ *Dumont v. William*, 18 Ohio, 515; *Buxten v. Durin*, 29 Maine, 434; *Straver v. Ehli*, 16 Johns. 201; *Ellis v. Wild*, 6 Mass. 321; *Merriam v. Wolcott*, 3 Allen, 528; *Aldrich v. Jackson*, 5 R. I. 218; *Terry v. Bissell*, 26 Conn. 23; *Thrall v. Newell*, 19 Vt. 202.

SEC. 453. Where a negotiable promissory note has been protested for non-payment, and the liability of the endorsers has been fixed by notice, such endorsers selling such note without erasing their endorsement, will be held responsible for the non-payment of the same, though no notice is given them of non-payment. They are estopped by their acts from controverting their liability upon the note.¹ A party who purchases a promissory note after it becomes due, through the activity and procurement of the endorsers, who induced him to buy without disclosing that they are discharged for want of notice; their silence is equivalent to an affirmation that they are still liable, and they cannot set up any want of notice as a defense to an action on the note.² A party who binds himself to indemnify another for all liabilities he might incur for a certain bank, by accepting their drafts, endorsing their notes, or the renewals thereof, or otherwise sends notes to such obligee in pursuance of such bonds which are endorsed by the latter and are negotiated, and the proceeds received and appropriated by the bank, while such notes, may not be executed as to be technically the notes of the bank, yet the obligor is estopped from setting up the defect to defeat a suit upon the bond or mortgage given to secure it.³ Where the holder of a note agrees to relinquish all claim upon an endorser of the note, if he will secure other notes endorsed by him, and pay the costs of actions commenced upon such other notes, and the endorser gives the security and pays the costs, this will estop the holder from suing such endorser on the note.⁴ An endorser of a note who waives a demand of payment upon the maker, and notice to himself of non-payment, either wholly or for a specified time after maturity, is estopped from setting up in defense a want of demand and notice at the maturity of the note.⁵

SEC. 454. In the absence of any devise to put him off his

¹ *St. John v. Roberts*, 31 N. Y. 441.

² *Libby v. Pierce*, 47 N. H. 309.

³ *McConilie v. McClurg*, 18 Wis. 637.

⁴ *Eccleston v. Ogden*, 34 Barb. 444.

⁵ *Pawer v. Mitchell*, 7 Wis. 161; *Day v. Elmore*, 4 Wis. 190.

guard, a party, who knowing the capacity to read an instrument, signs it without reducing it, he places himself beyond legal relief. Thus where a promissory note was on its face, made payable to A., the maker of the note was estopped to deny that the note was made to A.¹ Where a person whose signature is forged to a promissory note, upon being asked by one, who afterwards purchases it, if he shall purchase, and tells him that he may, or where, after purchase, when the note falls due, he promises to settle it, he cannot afterwards excuse himself from paying it, on the ground that it is a forgery. If a person whose signature is forged, treats the forged notes as valid, and thereby leads the community to believe that the forger has authority to draw notes in his name, he will be bound to pay similar notes, purchased by one who is deceived by his conduct. Where the person, whose signature is forged, promises the forger to pay the note, this amounts to a ratification of the signature and binds him.² The guarantor of the collection of a note or debt, if he consents to a delay in the prosecution of the principal debtor, on his failure to pay at the maturity of the debt, will be estopped from setting up such delay as a defence to a suit upon the guaranty.³

SEC. 455. An acceptor of a bill is not allowed to allege that the signature of the drawer is a forgery; by accepting it he accredits the bill and gives it currency in the market.⁴ There is no ground of principle upon which he can raise such a defense. He knows, or is presumed to know, the handwriting of the drawer, and his acceptance is a contract entered into upon the basis of facts that are peculiarly within his knowledge. So where a party taking a bill inquires beforehand if the acceptance is genuine, and he answers that it is, he is estopped from afterwards denying his signature, in an action brought by the purchaser, who acted on the faith of his representation.⁵ Where an acceptance is not

¹ Rogers v. Place, 29 Ind. 577.

² Crouts v. Dewolf, 1 R. I. 393.

³ Day v. Elmore, 4 Wis. 190.

⁴ Levy v. U. S. Bank, 4 Dall. 234; Price v. Neal, 3 Burr, 1354; Smith v. Mercer, 1 Marsh. 453; Wilkinson v. Luttridge, 1 Stra. 618.

⁵ Leach v. Buchanan, 4 Esp. 226; Cooper v. Le Blanc, 2 Stra. 1051; Wilkinson v. Luttridge, *supra*.

regarded as a contract to pay according to the tenor of the bill, it is sufficient to estop him from denying the signature of the drawer in an action brought by the holder, who took it after it had been accepted. The acceptance being made after sight of the bill admits the drawer's signature. The acceptor is estopped from disputing the drawer's ability, or, if after the sight of the bill, his handwriting. The indorsee, that of disputing that of any antecedent party to the bill. Where a bill was drawn and indorsed in the name of a fictitious person, the acceptor is estopped from questioning his existence or signature, either as maker or indorser; for the reason that the maker being imaginary, the admission of his handwriting for one purpose necessarily admits it for another.¹ The acceptor for honor of a bill of exchange, is estopped to deny its genuineness in a suit by the holder, who discounted it on the faith of the acceptance, or from disputing that there is such a person as the payee named therein.² It also estops the denial of the authority of the agent who signed the instrument by procuration.³ The estoppel does not extend beyond the genuineness of the drawer's signature. The acceptor is not estopped from showing that the body of the bill has been altered,⁴ and may deny the handwriting of the endorser, unless he has been guilty of laches,⁵ even where the bill purports to be drawn by the same person.⁶ An acceptor cannot plead that the drawer is a married woman, and he is estopped from denying or disputing her competency.⁷ An acceptor or endorser cannot deny that the instrument was duly drawn or endorsed as against a subsequent purchaser for value on the faith of the signature, and is consequently entitled to rely on it as an equitable if not legal estoppel.⁸ If consignees act upon the faith

1 *Cooper v. Meyer*, 10 B. & C. 468.

2 *Phillips v. Imthurn*, 18 C. B. N. S. 694.

3 *U. S. Bank v. Bank of Geo.* 10 Wheat. 833; *Smith v. Massack*, 6 C. B. 486.

4 *Bank of Commerce v. Union Bank*, 2 N. Y. 230.

5 *Canal Bank v. Albany Bank*, 1 Hill, 287; *Gloucester Bank v. Salem Bank*, 17 Mass. 41.

6 *Robinson v. Garrow*, 7 Taunton, 555; *Beman v. Durck*, 11 M. & W. 251.

7 *Byles on Bills* 185; *Troy Bank v. Lanman*, 1 N. Y.; *Woodward v. Harbin*, 1 Ala. 104.

8 *McGregor v. Rhodes*, 6 El. & B. 266; *Lambert v. Oaks*, 1 Ld. Rynd. 115; *Drayton v. Dale*, 2 B. & C. 293; *Pitt v. Chapman*, 8 M. & W. 616.

of a bill of lading, (as by making advances,) the ship owners are estopped as against them from denying the amount therein expressed, and are liable to them for any deficiency.¹

SEC. 456. No one who contracts expressly as principal or assumes a position which is at variance or inconsistent with the relation of suretyship, can show that he is surety, or claim any of the rights incident to that character. This is equally true at law and at equity, and was strikingly illustrated by the case² in the Supreme Court of the United States, when the sealed writing obligatory on which the suit was brought, contained a recital that the defendants were bound as principals, and not as sureties, which estopped them from denying that such was the true nature of their obligation.

SEC. 457. The acceptor of a bill of exchange cannot show that he has put his name to it without consideration for the purpose of placing himself in the position of surety, for no one can vary the basis on which he has contracted, after the contract is made; a defendant who has assumed the guise and character of a principal cannot change his position subsequently to the injury of others who have dealt with him on that footing.³ The defendant is bound to submit to all the incidents and undergo all the consequences of the position in which he has voluntarily placed himself; one of which is that of being primarily and ultimately answerable notwithstanding a temporary or final discharge of the other parties to the instrument. This same principle applies to a promissory note which the makers had executed, each as principals, and held to preclude a defense based on the ground that the relation between them was that of principal and surety.⁴ Even knowledge of the nature of the acceptance at the time when the bill is taken will not vary its effect, nor preclude the holder from treating the acceptor as

¹ *Norris v. Mil. Dock Co.* 21 Wis. 130; *Ellis v. Welland*, 9 N. Y. 529; *Meyer v. Peck*, 28 N. Y. 590.

² *Sprigg v. Bank of Mt. Pleasant*, 10 Peters, 257.

³ *Fenton v. Pocock*, 5 Taunt. 551; *Sprigg v. Bank of Mt. Pleasant*, 14 Peters, 201; *Bank of Montgomery v. Walker*, 9 S. & R. 229.

⁴ *Claremont Bank v. Wood*, 10 Vt. 182.

a principal.¹ He who makes a note or accepts a bill for the accommodation of another, virtually authorizes those who take the instrument subsequently, to make such terms or arrangements with the endorsers, as may be most conducive to their mutual interests, and cannot revoke the authority thus given, to the injury of others who have acted upon it. A defendant who contracts expressly as principal, cannot claim relief either at law or equity, on the ground that he is merely a surety, and was known to be such when the instrument was executed. The implication which arises from making a note or accepting a bill, supercedes the necessity for an express covenant or recital, and estops the maker or acceptor from pleading the collateral relation between himself and the payee, as a bar to an action brought to enforce the instrument; no court can depart from or vary the meaning of a contract as expressed in its terms, and it is equally binding whether in a court of law or equity.

SEC. 458. A judge who gives to a bank an order on the a state treasurer, directing him to pay such bank or order on subsequent day a certain sum "in full for his quarters' salary commencing on that day," thereby clothes such bank with the apparent ownership of the fund, and as against bona fide purchasers of such order for value, is estopped from asserting that such apparent ownership was not the real ownership, notwithstanding such order was given without value, and as a mere authority to receive the money for his use.² Where a party upon the faith of a promise by another, that if the plaintiffs would suspend bringing an action upon a second note of the defendant, he would abide by the decision of the first action upon a similar note of the defendant, delayed bringing an action upon the second note until after the decision of the action upon the first note, and until after the statute of limitations had attached, the defendant upon the doctrine of equitable estoppel or estoppel *in pais*, is precluded from setting up the statute of limitations as a defence.³

¹ White v. Hopkins, 5 W. & S. 99; Lewis v. Handman, 2 Penn. 416; Commerce Bank v. Cunningham, 21 Pick. 551; Harrison v. Cornsblath, 1 E. & A. 66; Bank of Ireland v. Beresford, 6 Dow. 243.

² State Bank v. Hastings, 15 Wis. 75.

³ Brookman v. Metcalf, 31 How. Pr. 429; S. C. 1 Rob. 578.

SEC. 459. An estoppel *in pais* may be urged against the defence of usury as well as against other matters of defence which do not involve any idea of legal or moral turpitude. Thus, where a sale of a note is negotiated by an agent of the maker, for the purpose of raising money for them jointly, and the agent in the sale of the note declares to the purchaser that it is a valid business note, the maker is estopped from setting up the defence of usury.¹ A note was made payable to the makers own order, and his certificate was attached thereto stating that the note was given for value and would be paid when due. The note was then sold to the plaintiff for a greater discount than the legal rate. In an action by the plaintiff thereon the maker cannot set up the defence of usury, as that would give him an opportunity to profit by his own deception practiced on the plaintiff.² This estoppel is as applicable to an indorser of an accommodation promissory note, who represents that the note is valid business paper as to the maker of the note. Where the maker of a note annexes thereto at the time of executing it, a certificate that it was given for value received, and that it will be paid when due, he will be estopped from setting up usury as a defence to it in an action by a bona fide holder for value. One who transfers a note void for usury with full knowledge of its invalidity, though without indorsement is responsible on an implied warranty to repay the amount of it.³

SEC. 460. In regard to bonds, where a special agent is clothed with the apparent authority to make an unconditional delivery of a bond, the obligee, without any knowledge that any conditions were imposed by the principal, to be complied with before the agent is authorized to deliver the bond, and the bond is delivered to the obligee, nothing short of absolute notice will vitiate or avoid it, and the sureties are estopped from setting up anything in order to vitiate the bond. The surety signs an instrument complete on its

¹ Ferguson v. Hamilton, 35 Barb. 427; Munson v. Anthony, 3 Keyes, 609.

² Chamberlain v. Townsend, 26 Barb. 611; McKnight v. Wheeler, 6 Hill, 492.

³ Mechanics Bank of Brooklyn v. Townsend, 29 Barb. 561; Edwards v. Dick, 4 B. & A. 212; Delaware Bank v. Jarvis, 20 N. Y. 226.

face, and delivers it to the principal to pass to the obligee. If he impose any condition upon his delivery, he must rely upon the principal to execute that condition, for he has made him his agent for the general purpose of a delivery, and has clothed him with the *indivisa* of a sub-agency. The obligee accepts an instrument perfect in form and execution, which comes to him from the person who should have possession of the instrument for the purpose of such delivery. The entire transaction, so far as the obligee is involved, is according to the ordinary and natural course. The surety, however, while he executes the instrument and places it in the usual channel for delivery, departs from the ordinary course of procedure by circumscribing the general authority by a condition unknown to the obligee. The condition is disregarded, a fraud is accomplished, and he who has not scrupled to trust his principal with the semblance of a general authority to make the delivery, must stand the hazard he has incurred. So where a surety signed a county treasurer's bond, at the request of the principal obligor, after the signatures of other sureties, without reading it, or hearing it read, or asking what it was, upon being told by the principal that it was a county paper, such surety is not released by the fact that one of the signatures is forged. When a bond has been signed and delivered to the principal obligor by a surety, upon the condition that others, not named in the instrument, shall sign before it is delivered to the obligee, and it is delivered without the signatures being obtained, and received by the obligee without notice of such condition of circumstances which should put him upon inquiry, the condition imposed will not avail the surety. This is not a question of the power of the principal to deliver the bond in its apparently perfect condition, but simply a question of estoppel. A surety signing and delivering to the principal obligor a bond, before the names of the sureties have been inserted in the body of the instrument, will be held as agreeing that the blank for such names may be filled in after he has executed it.¹ When a surety bond is exe-

¹ Eagleton v. Guttridge, 11 M. & W. 465; Smith v. Crocker, 5 Mas. 568; *Id.* of Berwick v. Huntress, 53 Me. 89; Hudson v. Perwell, 5 Bing. 205; McCarty v. Pepper, 31 Ind. 76.

outed by the plaintiff, at the request of the defendant, and upon his promise to indemnify the plaintiff, the defendant is estopped from alleging that the bond given by the plaintiff is invalid.¹ A party who executes a bond as surety for a bank, which receives canal tolls on deposit, and thus admits its existence, and, by his bond, covenants for a faithful performance of its contract, will, when sued upon such bond, be estopped from denying that such bank has a legal existence.² Where one has voluntarily signed a guardian's bond, which has been accepted by the probate court, he is estopped to set up that the court did not order the bond to be made.

SEC. 461. Where a mortgage is made in express terms subject to certain bonds secured by a prior mortgage, these bonds being negotiable in form, and having in fact passed into circulation before such former mortgage was given, the junior mortgagees, and all parties claiming under them, are estopped from denying the amount or the validity of such bonds so secured, if in the hands of *bona fide* holders.³ Where a bond and mortgage has been assigned to and deposited with the comptroller as security for circulating notes of a bank, the party who deposited the same is estopped from denying their validity in his hands. And if they have been sold by the comptroller in the party's presence, the party making no objection thereto, he is estopped from denying their validity in the hands of the purchaser.⁴ One who guarantees in writing the payment of a bond assigned by him thereby estops himself from denying in an action on the guaranty that the makers of the bond were competent to contract in the manner they did. The guaranty of the payment of the bond by the defendant imports an agreement or undertaking that the makers of the bond were competent to contract in the manner they did, and that the instrument is a binding obligation upon the makers.⁵ If a obligor, who

¹ *Jarvis v. Sewall*, 40 Barb. 449.

² *People v. McCumber*, 18 N. Y. 315.

³ *Bronson v. LaCrosse R. R.* 2 Wall. 283.

⁴ *Hubbard v. Briggs*, 31 N. Y. 518; *Remsen v. Graves*, 41 N. R. 473.

⁵ *Zabriskie v. C. C. & C. R. R.*, 23 Howard, 399; *Coggill v. Am. Exchange Bank*, 1 N. Y. 113; *McLaughlin v. McGovern*, 31 Barb. 208; *Erwin v. Downs*, 15 N. Y. 575.

was also one of the obligors in a bond, could not make a delivery to himself, an assignment and delivery of the bond to a third person estops him from setting up the objection in a suit on the bond by the assignee. It is like the case of a partner making the note payable to one of the firm, which becomes valid and collectable at law in the hands of a *bona fide* holder.¹ It is the duty of the obligor in a voluntary bond to add the stamp, and neither he nor his sureties can allege his own neglect in avoidance of the stamp.²

SEC. 462. Where there has been a special contract, and the plaintiff has performed a part of it according to its terms, and has been prevented by the act or consent of the defendant, or by the act of the law from performing the residue, he may in general assumpsit recover compensation for the work actually performed, and the defendant cannot set up the special contract to defeat him. But where there is an entire executory contract, and the plaintiff has performed part of it, and then wilfully refuses without legal excuse, and against defendant's consent to perform the rest, he can recover nothing either in general or special assumpsit. No one who waives or dispenses with the performance of a contract can rely upon the failure to perform it, either as a defence or a cause of action, for no one can complain of a default which he has caused or sanctioned.³ A stranger to a contract is estopped from taking advantage of a breach of its conditions. Where in part performance of a contract a party has advanced money or done an act, and then stops short and then refuses to proceed to its conclusion, the other party being ready and willing to proceed to fulfil all his stipulations according to the contract, such first named party is estopped from recovering back what has thus been advanced or done.⁴

SEC. 463. Contracts vitiated by fraud are regarded by the law as voidable, not void. So a man who has his option

¹ *Bradford v. Williams*, 4 How. 576.

² *McGovern v. Hoesback*, 53 Penn. 76.

³ *Shaw v. The Lewiston Turnpike Company*, 2 Penn. 154; *McKee v. Miller*, 4 Blackf. 222; *Young v. Hunter*, 6 N. Y. 203; *Boutwell v. O'Keefe*, 22 Barb. 134; *Hart v. Louman*, 29 Id. 110.

⁴ *Hansborough v. Peck*, 5 Wallace, 197.

whether he will affirm a particular act or contract, must either elect to affirm or disaffirm it altogether. He cannot adapt that part which is for his benefit and reject the rest. He cannot do both, therefore, if a party with knowledge of a fraud in a contract which would enable him to avoid it, treats it as a subsisting contract, he is estopped afterwards from repudiating it. A party delivering goods and inducing his creditor to accept them in payment, is estopped from alleging the contract to be void, and recovering their price.¹ If the vendor of a chattel receives payment of the purchase money and delivers possession of the property to the purchaser, he is estopped from asserting that the contract is invalid, whether such invalidity arises from the illegality, or of the consideration, or from the legal incapacity of the purchaser to make the contract.² A party to an illegal contract is not allowed by an allegation of his own turpitude to recover back what in pursuance of a forbidden bargain he has delivered to the other party, or in any way avoid the bargain when once executed.

SEC. 464. The taking of usury is a misdemeanor by statute in many of the states. The borrower may set up usury for the purpose of avoiding a contract tainted with it, but not the lender, it cannot be avoided by the party guilty of the fraud, he is estopped from setting it up to his own advantage.³ A party to a contract who himself knowing the special or technical meaning of certain material words as used in such contract, and knowing that the other party is ignorant thereof, falsely states to the latter that they have some other or different signification, and thereby induces him to execute and act upon his contract to his injury, is estopped by such representations from taking advantage of the contract.⁴ Where a contract on behalf of the state, between an officer thereof and an individual, is pursuant to a power, vested in him by the statute declared illegal by the proper law officer of the state, the state, its agents and servants

¹ Fowler v. Moller, 10 Boss. 374.

² Morris v. Hall, 41 Ala. 510.

³ Lafarge v. Hester, 9 N. Y. 241.

⁴ Calkins v. The State, 13 Wis. 389.

are estopped from denying its illegality.¹ A creditor who with knowledge of an assignment by his debtor, fraudulent in law upon its face enters into an agreement with his debtor, and the trustees named in the assignment, for the management of the trust property, and the distribution of its proceeds in accordance with the terms of the assignment, the performance of such agreement having been entered upon, is estopped from impeaching the assignment for such patent defect.²

SEC. 465. A creditor who has confirmed a fraudulent deed by receiving a benefit under it, or has become a party to it is estopped from afterwards impeaching it. Where a creditor by undertaking to discharge his debtor, induces other creditors to accept a composition and discharge the debtor from further liability, he is estopped from afterwards enforcing his claim for the reason that it would be a fraud on the other creditors. Where the plaintiffs sold the defendant a large amount of wheat in bulk, and furnished him with a weigher's certificate of the quantity, and were paid for the quantity certified, and the defendant relying upon the correctness of the certificate, resold it as of the same quantity, the plaintiffs are estopped from afterward disputing the accuracy of the certificate.³ Where a charter party provides that a vessel shall carry a certain number of tons, and the charterer permits her to carry a less cargo without objection, he is estopped from objecting that it was not a performance of the contract.⁴ Where, under a contract for the sale of hops, a third party who was to inspect and brand them, neglected to put on the brand after inspection, and the purchaser at a time when the omission might have been supplied said it would make no difference, he is estopped from insisting on the omission to brand in an action against him on the contract.⁵

SEC. 466. Where one purchased an interest in a patent,

¹ Peak v. Burr, 10 N. Y. 294.

² Rappello v. Stewart, 27 N. Y. 310.

³ Gillespie v. Carpenter, 1 Robertson, N. Y. 65.

⁴ Roberts v. Opdyke, 1 Robertson, N. Y. 287.

⁵ Clinton v. Brown, 11 Barb. 22.

and agreed with the patentee, upon certain conditions, to give his personal attention to manufacturing of machines under the patent, afterwards made a second agreement with the patentee whereby he agreed to discontinue such manufacture. He was estopped in an action brought against him by the patentee for continuing such manufacture, and for an account, from setting up the defence that such patentee was not the original and first inventor of the thing patented.¹ Where a party claiming to be the owner of a patent right or a machine licenses another to make and sell such machine within a certain territory, and in consideration of such license the latter agrees to pay the former a given sum by way of royalty on each machine manufactured by him and sold, and a large number of machines being manufactured a part of which are sold and a part remain on hand, the parties enter into a compromise agreement whereby the licensee executes to the licensor his promissory note for the amount due under the former contract for the machines sold, but largely reducing the royalty payable for the machines remaining on hand and those thereafter to be made, the makers of the note having fully enjoyed without interruption everything for which they stipulated in the contract under which they proceeded, are estopped to deny a consideration for the note either on the ground of utility or the want of novelty in said machine.² A person who signs and delivers a message under the printed heading furnished by a telegraph company containing the terms and conditions upon which messages will be sent, is estopped from denying the agreement which he has signed by alleging that he never read it.³ Where a board of supervisors accept and act upon an account containing various items presented to them for audit and allowance, they are estopped from subsequently objecting that the account only is verified and not the items of the account as required by the statute.⁴

¹ *Parkhurst v. Kingsman*, 1 Blackfd. 488.

² *Kinsman v. Parker*, 18 Howard 282; *Bartlett v. Holbrook*, 1 Gray, 114; *Cutler v. Bowen*, 11 A. & E. 253; *Laws v. Purser*, E. C. & E. R. 48; *Bowman v. Taylor*, 2 A. & E. 278; *Davis & Co. v. Gray*, 17 Ohio S. 530; *Kenasle v. Hunt*, 9 Blackfd. 57; *Wilder v. Adams*, 2 W. & M. 329.

³ *Breese v. U. S. Telegraph Co.*, 45 Barb. 274.

⁴ *Sherman v. The Supervisors*, 39 How. Pr. 173.

CHAPTER XVII.

EQUITABLE ESTOPPEL,

AS APPLIED TO THE RELATION OF PRINCIPAL AND AGENT,
MARRIED WOMEN, INFANTS, ADMINISTRATORS, &c.

SECTION 467. The doctrine of election is founded upon the principle that there is an implied condition, that he who accepts a benefit under an instrument must adopt the whole of it, conforming with all its provisions, and renouncing every right inconsistent with them. This principle is recognized and established in this country almost precisely the same as in England, and rests upon the equitable ground that no man can be permitted to claim inconsistent rights with regard to the same subject, and that any one who claims an interest under an instrument, is bound to give full effect to that instrument as far as he can. A person cannot accept and reject the same instrument, or having availed himself of it as to part, defeat its provisions in any other part: and this applies to deeds, wills, and all other instruments whatsoever. Taking possession of property under a will or other instrument, and exercising unequivocal acts of ownership over it for a long period of time, will amount to a binding election to confirm the instrument.¹

SEC. 468. A man who has his option whether he will affirm a particular act or contract, must elect either to affirm or disaffirm it altogether; he cannot adopt that part which is for his own benefit and reject the rest. He cannot blow hot and cold. If a party having the right to repudiate or affirm a transaction, affirms it, he cannot afterwards resort to his right of repudiation. Thus, where the assignees of a bankrupt brought *trover* for chattels of the bankrupt, of

¹ Upshaw v. Upshaw, 2 H. & M. 381; Wilson v. Hayne, Chever's Equity, 57; Caston v. Caston, 2 Richardson's Equity, 1; Stark v. Hutton, Saxton's Chancery, 217; Clay & Craig v. Hart, 7 Dana, 1.

which the defendant had taken possession. The chattels were part of the bankrupt's stock in trade, which, on the bankrupt's absconding, the defendant had taken possession of and carried on the trade. He had, however, rendered to the assignees a fair account and turned over the balance. "The defendant," said Bayly, J.,¹ "in the first instance was a wrong-doer, and the plaintiffs might have treated him as such. But it was competent in their character of assignees, either to treat him as a wrong-doer and disaffirm his acts, or to affirm his acts and treat him as their agent; and if they had once affirmed his acts and treated him as their agent, they cannot afterwards treat him as a wrong-doer, nor can they affirm his acts in part and avoid them as to the rest. By accepting and retaining the balance, without objection, they affirmed his acts, and recognized him as their agent, and having done so, they are not at liberty to treat him as a wrong-doer." That a party cannot affirm the existence of a contract to promote the purpose of a recovery and yet treat it at the same time as a nullity, in order to shut out the opposite party from a defense, which would be open to him, is entirely too inconsistent with reason to leave much room for dispute. When it becomes necessary to choose between inconsistent rights or remedies, the election will be final, and cannot be reconsidered, even where no injury has been done by the choice, or would result from setting it aside, and where a bond or promissory note is joint and several in its terms, the promisee or obligee must treat it as being either the one or the other, and cannot sue one of the obligors or promisors separately after obtaining a joint judgment against all.² Where a tenant holds over after the end of the term, or incurs a forfeiture by committing a breach of condition during its continuance, the landlord may treat him as a trespasser, or as being rightfully in possession, but must choose between the two, and cannot enter and bring ejectment after the receipt of subsequent rent,³ nor enforce the payment of

¹ *Brewer v. Sparrow*, 7 Barn. & Cress. 310.

² *Bank of Columbus v. Hart*, 6 Ohio S. 33; *Beltzhoover v. Commonwealth*, 2 Watts, 126; *United States v. Price*, 9 How. 83.

³ *Goodright v. Cordment*, 6 Tenn. 219; *McKeldore v. Darracott*, 13 Gratt. 278.

rent after entry and bringing ejectment.¹ As the election when once made will be final, the institution of a suit for rent will, though nothing is recovered, operate as an estoppel to a subsequent ejectment.² While issuing a writ or serving a declaration in ejectment will preclude the right to sue for subsequently accruing rent.³

SEC. 469. A person shall not be allowed at once to benefit by and repudiate an instrument, but if he chooses to take the benefit which it confers, he shall likewise take the obligation or bear the *onus* which it imposes; no person can accept and reject the same instrument. If a testator give his estate to A., and give A.'s estate to B., courts of equity hold it to be against conscience that A. should take the estate bequeathed to him, and at the same time refuse to give effect to the implied condition contained in the will of the testator. The court will not permit him to take that which cannot be his but by virtue of the disposition of the will, and at the same time to keep what, by the same will, is given or intended to be given to another person. It is contrary to the established principles of equity that he should enjoy the benefit, while he rejects the condition of the gift.⁴ Where, therefore, an express condition is annexed to a bequest, the legatee cannot accept and reject, the will containing it. If, for example, the testator possessing a landed estate of small value, and a large personal estate, bequeaths by his will the personal estate to the heir, who was not otherwise entitled to it, upon condition that he shall give the land to another, the heir must either comply with the condition, or forego the benefit intended for him. Where a party to a contract, which might be impugned on the ground of fraud, knowing of the fraud, nevertheless elects to treat the transaction as a binding contract, he thereby loses his right of rescinding it; for fraud only gives a right to avoid or rescind a contract.⁵

SEC. 470. If a party be induced to purchase an article by

¹ Hemphill v. Flynn, 2 Penn. 144; Stuyvesant v. Davis, 9 Paige, 476.

² Denby v. Nichol, 1 C. B. N. S. 377.

³ Jones v. Carter, 15 M. & W. 517.

⁴ Kerr v. Wanchope, 1 Bligh, 21.

⁵ Stevenson v. Newnham, 13 C. B., 302.

fraudulent misrepresentations of the seller respecting it, and, afterward discovering the fraud, continue to deal with the article as his own, he cannot recover the money paid from the seller; nor does there seem any authority for saying that a party must, in such a case, know all the incidents of a fraud before he deprives himself of the right of rescinding. Where an agreement has been procured by fraud, the party defrauded may at his election treat it as void, but he must make his election within a reasonable time.¹ The party guilty of the fraud has no such election.

SEC. 471. The estoppel of an election will extend beyond the immediate parties to the suit or act by which the election is made, and be binding in favor of all who claim under or are connected with them as privies.² Thus when a vendor who has sold goods to an agent for an undisclosed principal, has once signified his intention to charge or sue either of them with full knowledge of the relation in which he stands to both, he will be bound by his determination and cannot afterwards recall it for the purpose of proceeding against the other. In like manner a suit for the proceeds of goods or lands which have been sold wrongfully without authority, will operate as an affirmance of the sale, not only in favor of the defendant *ante*, but all who claim mediately or immediately under him as purchasers, and give them a good title to the property by the mere fact of its institution before and independently of judgment or satisfaction.³ And where a prisoner under a *ca. sa.*, who has been permitted to go at large by a sheriff, subsequently returns to jail and is handed over to his successor, who again suffers him to depart, the plaintiff in the execution may consider him as having remained in custody for the purpose of making the second sheriff responsible, or as having escaped for that of charging the first, but cannot do both, and will be barred by suing either from recovering subsequently against the other.⁴

¹ E. A. R. R. v. E. C. R. R., 11 C. B. 803; *Pilbrow v. P. A. R. R.* 5 C. B. 453.

² *Merrick's Estate*, 5 W. & S. 9.

³ *The Fire Ins. Co. v. Cochran*, 27 Ala. 228.

⁴ *Rawson v. Turner*, 4 Johnson, 469.

SEC. 472. Whatever may be the rule in other cases, there can be no doubt that when the ground taken by either party to a suit, is prejudicial to the other by cutting him off from a good defence, or precluding a recovery on a valid cause of action, it will bind the party who adopts it, by an equitable estoppel, if in no other way, and will preclude him from shifting his ground, in a subsequent suit, to the injury of his opponent. Thus a defendant who succeeds in defeating one action, on the ground that a third person ought to have been joined with the plaintiff as a partner, will not be permitted to deny the partnership in a subsequent suit, instituted for the same debt by both.¹ In like manner, one who pleads a former recovery for the same cause of action, will be legally and equitably precluded from denying the validity of the judgment thus pleaded, in any subsequent proceeding instituted upon it.² And when an equity which had been sold under a decree of court was subsequently bought with notice of the rights of an intervening purchaser, and then used by the buyer as a means of procuring a patent from the United States, he is held to be estopped from setting up the invalidity of the decree against the prior purchaser, because the patent was granted under the belief that the applicant had a right to the land, and would not have been issued if the proceeding which constituted the foundation of his title had been known to be defective.³ The principle is a general one, and applies in every instance, where an attempt is made to present the same matter in different and inconsistent aspects, and thus gain an inequitable and unfair advantage.⁴

SEC. 473. The doctrine that no one can adopt or affirm those portions of a transaction which make in his own favor, and disaffirm the rest to the injury of third persons, is held in equity to preclude a legatee or devisee, who accepts a benefit under the will, from impugning the right of a testator to dispose of the other property, given by the same in-

¹ Kelley v. Eichman, 3 Wharton, 419.

² Taylor v. Parkhurst, 4 Barb. 97.

³ Garrett v. Lyle, 27 Ala. 586.

⁴ Hayes v. Gudykunst, 1 Jones, 221; Varick v. Edwards, 11 Paige, 289; Queen v. Sandwich, 102 B. 563, 571.

strument,¹ and has a wide and beneficial application at law. Thus, a creditor, who receives, or even comes in and claims a dividend under an assignment in trust for the payment of the debts of the assignor, cannot subsequently impeach it as fraudulent and void, for want of compliance with the act of assembly, by which such transfers are regulated.² A right arising under a legacy or a will, or a gift by the testator in his lifetime, may be extinguished by allowing the executor to charge himself with the value of the property in his account, and apply it to the payment of distributees and creditors.³

SEC. 474. A party who has once made an election, is bound to abide by his determination, unless he can restore the property to its original situation.

SEC. 475. The principle of election, requiring a man to choose between different and inconsistent rights, estopping him from asserting one when he has deliberately elected to enforce the other, is a rule of natural justice which has long been known to the common law, and has been enlarged and liberalized by equity.⁴ Thus, a party will not be allowed to impeach or impugn a title or decree which he has set up or relied on in a prior proceeding, if the effect will be to place other persons in a worse position than they would have held if he had maintained the ground originally taken.⁵ Any person accepting a benefit conferred by a will, is estopped from disputing its provisions or claiming property which he is entitled in his own right, but which has been bequeathed by the testator to third persons, without making them a compensation equal to the full value of the gift.⁶ But the estoppel is not created unless the acts or declarations constituting it are plainly inconsistent with the rights which

¹ Leading Cases in Equity, 3 Am. ed. 400.

² *Adlum v. Yard*, 1 Rawle, 163; *Burke's Estate*, 1 Parson's Equity, 470; *Jones v. Hersey*, 4 Md. 306; *Lanahan v. Latrobe*, 7 Id. 27 c.; *Burrows v. Alter*, 9 Missonri, 424; *Gutzwiller v. Lackman*, 23 Id. 168; *Garnham v. Rogers*, 1 Dickens, 63.

³ *Harrison v. Pool*, 16 Ala. 167; *McCrevy v. Remsen*, 19 Ala. 430.

⁴ *Martin v. Ives*, 17 S. & R. 364.

⁵ *Baily v. Baily*, 44 Penn. 274; *Ullery v. Clark*, 18 Penn. 148

⁶ *Smith v. Guild*, 34 Me. 443; *Martin v. Ives*, 17 S. & R. 364.

they are alleged to have barred, and were made with full knowledge of its existence.¹ Where one puts forth his own title to the premises in controversy, in support of the tenant's title, in an action of ejectment, and thus invites the action against himself, it is then too late for him to object that he is not a proper party to the action.²

SEC. 476. A creditor who treats a deed as conclusive evidence for the purpose of seizing, on attachment or execution, the fruits produced by the grantee's industry, upon a claim that such fruits belong to the grantor, will not be permitted to contest the validity of the conveyance in an action brought against him by the grantor for such taking. A party cannot ratify and yet repudiate the same transaction in the same breath.³ Thus, a defendant having wheat stored in a warehouse, sold it and gave the purchaser an order on the warehouseman to deliver it out of store No. 11, as per the receipt of the warehouse held by him. The warehouseman filled the orders and delivered the wheat out of the plaintiff's wheat in No. 12, and the defendant received the price. Held, that having availed himself of the acts of his agent to obtain the vendee's money, he could not repudiate so much of the agency as would enable him to keep the money and defeat the plaintiff's action for money had and received.⁴ So a party is estopped from denying the *bona fide* character of securities, and thus rendering usurious a loan obtained by him upon his own representations that the securities were valid.⁵ A creditor who has confirmed a fraudulent deed by receiving a benefit under it or has become a party to it, is estopped from afterwards impeaching it,⁶ and an insolvent assignee who has affirmed a fraudulent sale of the insolvents, by suing for the price and attaching the debtor's property, cannot afterwards set aside the sale and maintain trover for the property.⁷ A judgment creditor,

¹ Fitts v. Crook, 5 Cush. 566.

² Abell v. Van Gelder, 36 N. Y. 513.

³ Garburt v. Smith, 40 Barb. 22.

⁴ Cobb v. Dows, 10 N. Y. 335.

⁵ American Life Ins. and Trust Co. v. Bayard, 5 N. Y. Leg. Obs. 13.

⁶ Burrows v. Alter, 7 Mo. 424.

⁷ Butler v. Hildreth, 5 Met. 49.

who, with full knowledge of the facts of the case, receives and appropriates to his own use the avails of a compromise, made by his agent or attorney on his behalf, is bound thereby, and cannot be permitted afterward to deny the authority of such agent or attorney.¹ If a person enters into a covenant to pay for personal property, the possession of which he acknowledges to have received, he will be estopped to deny the receipt of it, because it is a fact which he must have known. But if he recite that the vendor had title, he may, notwithstanding, show the contrary; because it is apparent that this allegation must have come from the vendor, and that the vendee could not otherwise have known its truth.² A party claiming to be the owner of goods by purchase and delivery, is estopped by the levy of an execution in his favor upon the same goods as the property of the defendant in the execution.³

SEC. 477. Impeachable transactions may be rendered valid by act of confirmation,⁴ or acquiescence for a great length of time.⁵ Acquiescence for a long time in an improper sale will disable a person from coming into a court of equity to set it aside. To fix acquiescence upon a party it should unequivocally appear that he knew the fact on which the supposed acquiescence is founded, and to which it refers. Laches do not apply to a body of creditors, to whom relief will be granted when it would be refused to an individual.⁶ Although acquiescence in an improper sale may have the effect of not enabling a party to set it aside, it nevertheless will not be sufficient to induce a court of equity to exercise its discretionary power of compelling specific performance of the agreement to sell.⁷

SEC. 478. Where property has been sold by mistake, as being the property of another to whom the proceeds were

¹ Paine v. Hibbard, 6 Wis. 175.

² Miller v. Bagwell, 3 McCord, 429.

³ Langsdorf v. Field, 36 Mo. 441.

⁴ Cole v. Tibbins, 3 P. Wms. 289.

⁵ Sibbering v. Earl of Baccarring, 3 De. G. & Sm. 735; Addis v. Campbell, 4 B. & A. 401.

⁶ Wieheote v. Lawrence, 3 Ves. 740; York Building Co. v. Mackenzie, 8 Bro. P. C.

⁷ Salmon v. Cutts, & Cutts v. Salmon, 4 De. G. & S. 125.

paid, affirms the sale; if, knowing the facts, he elects to accept from the latter the money received for such property, and actually receives a part thereof, although no time is specified for the payment of the balance; and he cannot afterward maintain an action for the conversion. Acceptance of part payment is an estoppel where a part of a claim presented to a legislative body is allowed and the claimant takes it, he is thereby estopped from suing for the balance.¹ When a sum appropriated by the legislature to a creditor of the state expressly *in full* for his demand, is received and drawn from the treasury by him, he is estopped from setting up any further claim on account of the same matter.² Especially when the amount due is in dispute, and the state offers the sum with a view to a final settlement, and the other party accepts it.³ If a claimant voluntarily comes before a board to audit and approve claims, and a law is afterwards passed allowing such claims and ordering them paid on presentation of a voucher with the commissioner's signature; the party presents his voucher and receives the sum so allowed by the board, he is estopped by his acceptance from recovering a balance which would remain on an assumption of the validity of his original contract.⁴

Where A. sold to B. a tract of land, taking his promissory note therefor; subsequently the notes not being paid, A. sold and conveyed the land to a third person, believing he had a right to do so. A. subsequently brought a suit on the notes, which B. defended on the ground of failure of consideration. Held that, although A. had no authority to make the second sale, yet he was estopped by it from setting up the former sale; and B., by setting up the second sale as a defence in the action on the notes, affirmed the title of the second purchaser.⁵

SEC. 479. An estoppel *in pais* may be created either by the acts of the party himself or by the acts of his agent, if

¹ *Pierce v. Keefe*, 11 Wis. 180.

² *Sholes v. State*, 2 Chaney. (Wis.) 182.

³ *Calkins v. State*, 13 Wis. 389; *Mussing v. State*, 112 Id. 502; *Baxter v. State*, 9 Id. 39.

⁴ *U. S. v. Adams*, 7 Wallace, 463.

⁵ *Oneida v. Thornton*, 6 Cranch 53.

it appear that the acts of such agent are within the scope of his authority. *Qui facit per alium, facit per se*, and it is upon this principal of law that the acts of an agent binds the principal and gives rise to the application and operation of the estoppel *in pais*. Thus if an agent who has full and absolute control of the disposition of goods in which his principal has an interest, consents either verbally or in writing to the sale thereof by a third person, or silently stands by and without objection permits such person to exercise a control over such goods inconsistent with the rights of his principal, or to sell them, and such third person acts upon such tacit permission, and would be injured by a retraction thereof, the principal will be effectually concluded by such acts of his agent.¹ Where the misconduct of the agent causes a breach of the obligation or contract of the principal, then the principal will be liable in an action, whether such conduct is wilful or malicious, or merely negligent.² A principal cannot set aside a settlement by his agent after availing himself of it.³ When the principal accepts, receives and holds the proceeds of a contract he will be estopped from denying an original authority or ratification. So a person having recognized the agency of a person, by correspondence and otherwise, is bound by his acts.⁴ If a principal procures and has the benefit of advances from his factor, it estops him from objecting to them as not complying with the agreement, whatever may be the form in which they are made.⁵

SEC. 580. Where the authority of an agent depends upon some fact outside the terms of his power, and which, from its nature, rests particularly within his knowledge; the principal is bound by the representations of the agent although false as to the existence of such facts.⁶ The doctrine of implied agency arising out of negligence has its true basis in

¹ *Emmersons v. Dowe*, 2 Wis. 322.

² *M. & M. R. R. Co. v. Finney*, 10 Wis. 388.

³ *Dougherty v. Hunter*, 54 Penn. 380.

⁴ *Burritt v. Reisch*, 4 McLean, 325.

⁵ *Bradley v. Richardson*, 23 Vt. 720, S. C. 2 Blatchford, C. C. 343.

⁶ *N. Y. & N. H. R. R. Co. v. Schuyler*, 34 N. Y. 30; *Griswold v. Haven*, 25 N. Y. 595.

the principle of estoppel *in pais*. That principle is founded upon the injustice of allowing a party to be the author of his own misfortune, and then to charge the consequences upon others, and it implies an act in itself invalid, a person is forbidden for equitable reasons to set up its invalidity. The institution of a suit by the principal to enforce a contract entered into in his name, by an unauthorized agent, is a sufficient ratification of the acts of such agent, and estops the other party to the contract setting up as a defence the agent's original want of authority.¹

SEC. 481. *Omnis ratihabitio retrotrahitur et mandato priori aequiparatur*—A subsequent ratification is equivalent to prior authority. The subsequent assent by the principal to his agent's conduct not only exonerates the agent from the consequences of a departure from his orders, but likewise renders the principal liable on contracts made in violation of such orders, or even when there has been no previous retainer or employment, and this assent may be inferred from the conduct of the principal. The subsequent sanction is considered the same thing in effect, as assent at the time; the distinction being that where the authority is given beforehand, the party giving it must trust to his agent—if after the act, the party knows all has been done according to his wishes.

SEC. 482. A ratification by the principal of part of an unauthorized transaction of his agent is a confirmation of the whole.² A principal cannot be allowed to conduct himself in such a manner as to mislead the public in regard to the authority of his agent, and then avoid the consequence of his acts by a single disclaimer of the authority of such agent; nor can a principal adopt a contract made by his agent or attorney without authority, under which he has acquired the title to property without further litigation, so far as to hold the title obtained under it, and repudiate the conditions upon which the sale was allowed to take place. If he

¹ Wieseger v. Wheeler, 14 Wis. 101; Emerson v. Newbury, 13 Pick. 379; Fisher v. Willard, 13 Mass. 379; Krount v. Price, 10 Miss. 211; Bank of Beloit v. Beale, 34 N. Y. 473; Overly v. Overly, 18 La. 549.

² Fargo v. Ladd, 6 Wis. 106.

repudiates at all, he must repudiate the whole, so as to restore the party to his former position.¹ A principal cannot ratify the acts of an agent for his own benefit, and repudiate them when adversely interested.² Where an agent, for the purchase of lands, without authority from his principal, employs a sub-agent to make such purchases, it is a sufficient ratification of the acts of such sub-agent if the principal subsequently agrees to receive a deed of his proportion of the land purchased, and to submit the question of the agent's expenses to arbitration. The rule that a principal is not bound by a ratification of an agent's act, which is made without full knowledge, does not require that he shall have had full knowledge of his rights. It is sufficient that he had full knowledge of the facts and circumstances of the transaction.³ By receiving and appropriating the proceeds of a sale made by an agent, with knowledge of the facts, the principal ratifies the sale, and makes himself answerable therefor.⁴

SEC. 483. An agent who acts wholly and exclusively as the agent of the money lender in negotiating a loan, and, in addition to taking security calling for the highest legal rate of interest, charges and receives a *bonus* for his services, must be presumed to be acting within the scope of his authority in taking such *bonus*, and makes his principal chargeable with the usury.⁵ Although an agent does not comply with an agreement, made between him and his principal, as to the manner in which a written authority, ample on its face, shall be exercised, yet contracts made by such agent with third persons who have no knowledge of such agreement, will be binding upon the principal, if they are within the limits of the authority expressly conferred.⁶ A party, who, in making a verbal contract represents that he is acting in concert with and for the benefit of another, and being afterward by letter requested to put such contract in

¹ Paine v. Wilcox, 16 Wis. 202.

² Beal v. Park Ins. Co. 16 Wis. 241; Winder v. Lane, 14 Md. 124.

³ Rawls v. Deshler, 3 Keyes, 572; Spright v. Hanley, 39 N. Y. 441.

⁴ President, &c. of Westfield Bank v. Cowen, 37 N. Y. 320.

⁵ Young v. Wright, 4 Wis. 144; McFarland v. Carr, 16 Wis. 251.

⁶ Mosher v. Chapin, 12 Wis. 433.

writing, replies that the person with and for whom he professes to be acting will come and arrange it, is estopped from denying the power of such person as his agent to bind him by a written contract of the same effect as the verbal one, even though it is executed by such agent in his own name only. A party in possession of a mill site, who represents to a dealer in building materials that the contract for such site was taken in his own name, but for the benefit of a third party, and that he had no interest therein, but that a third party is the real owner thereof; and procures from such dealer materials for a mill thereon, in the name and as the agent of such third party, who, as he says, will pay therefor, and, by like statements, induces such materialman to enforce his lien on the mill by suit against such third party; is thereby estopped from asserting that he is himself the owner of the property, as against the purchaser under the judgment in the lien suit; and from denying that such a third party was in possession through him as agent.¹

SEC. 484. Wherever one of two innocent persons must suffer by the acts of a third, he who has enabled such third person to occasion the loss must sustain it.² Whenever the very act of the agent is authorized by the terms of the power, so that by comparing the act done by the agent, with the language of the power, the act itself is warranted thereby, such act is binding on the principal as to all persons dealing in good faith with the agent.³

SEC. 485. No one person who contracts as principal, or assumes a position which is at variance or inconsistent with the relation of suretyship, can show any of the rights incident to that character.⁴ A party who for usurious consideration grants extension of time for payment to the maker of a note whereby the surety is released, is estopped from setting up such usury to defeat the rights which the surety acquired by reason of such extension.⁵ If principal and surety are

¹ Peabody v. Leach, 18 Wis. 657.

² Hanks v. Drake, 49 Barb. 186.

³ Murray v. Barringer, 3 Keyes, 107.

⁴ Sprigg v. Bank of Mt. Pleasant, 10 Peters, 257.

⁵ Riley v. Gregg, 16 W. 606.

jointly and severally bound in a bond, though there is no express admission on the face of the instrument that all are principals, yet the surety is estopped from alleging that he is surety only.¹

SEC. 486. The discharge of the surety is often dependent on the doctrine of equitable estoppel and not on the variation of the contract with the principle. It will not take place unless a course has been adopted on the faith of the statements or promises of the creditor which cannot be retracted or withdrawn without injury,² nor as it would seem unless the conduct of the creditor is marked by some violation of good faith or fair dealing.³ Wrong on one side and injury on the other being the essential ingredients of every equitable estoppel. A statement by the holder of a bill that it had been paid, by which the indorser was led to delay proceedings against the acceptor until the latter became insolvent was, however, held to be a good defence to the indorser whether the statement was made in good faith or fraudulently.⁴

SEC. 487. Those who have bound themselves as co-obligors or co-contractors are not allowed to show that their true characters is that of sureties.⁵ A surety who has bound himself as co-obligor by an instrument under seal is estopped from showing the real nature of his obligation as a defence to an action. Such is the rule at law in England at the present day⁶ and in this country.⁷

SEC. 488. A party who has bound himself to a direct and immediate performance is estopped from showing that his obligation is that of a guarantor, and that he is answerable only in the case of the default of a co-contractor or other person.

¹ Dibble v. Duncan, 2 McLean, 381; Sprigg v. Mt. Pleasant Bank, 14 Peters, 201.

² Hogeboom v. Herrick, 4 Vermont, 131

³ Wilson v. Green, 25 Vermont, 450.

⁴ Kingsley v. Vernon, 4 Sanford, 361.

⁵ Bull v. Allen, 19 Conn. 101; The Claremont Bank v. Wood, 10 Vermont 582; Yates v. Donaldson, 5 Md. 389.

⁶ Ashby v. Pidduck, 1 M. & W. 564.

⁷ Ward v. Johnson, 6 Mumford, 6; Steptoes Ad'rs. v. Harvey's Ex'rs. Leigh. 501; Deberry v. Adams, 9 Yerger, 52; Dozier v. Lea, Humphreys, 520; Pintard v. Davis, 12 Zabriskie, 632.

SEC. 489. A promise by the creditor ~~to~~ exonerate the surety, or to look solely to the principal, can have no effect of itself upon the liability imposed by the contract, unless founded upon a sufficient consideration. But when the surety is induced by such a promise, to surrender property or securities received from the principal, or to postpone or relinquish any of the means of indemnity, to which he might otherwise have resorted, it will take effect as an equitable estoppel, and deprive the promisor of the power of retraction.¹ The result is the same, when the creditor mistakenly and without any fraudulent intent, informs the surety that the debt is paid, or adopts some other course, of a nature to mislead him with regard to the extent or existence of his liability, and the latter, in consequence, surrenders a security held for its payment.²

SEC. 490. A *cestui que trust* may confirm an invalid sale, so that he cannot afterwards set it aside.³ But in order to constitute a valid confirmation a person must be aware that the act he is doing will have the effect of confirming an impeachable transaction.⁴ Where a debt due a *cestui que trust* has been paid to the trustee, who had no authority to receive it, the *cestui que trust* is estopped from collecting it if he has received the benefit of such payment.⁵

SEC. 491. "Where a person is charged as a member of a partnership, not because he is a member, but because he has represented himself as such, the law proceeds on the principle, that if a person so conduct himself as to lead another to imagine that he fills a particular situation, it would be unjust to enable him to turn round and say that he did not fill that situation. If, therefore, he appears to the world, or specially, to the party who is seeking to charge him, to be a partner, and has represented himself as such, he is not

1 Harris v. Brooks, 21 Pick. 195; Westmoreland Bank v. Kilmuth, 7 Watts, 525.

2 Carpenter v. King, 9 Metcalf, 511; Admrs. of Wilson v. Green 25 Vermont, 450.

3 Morse v. Royal, 12 Ver. 355; Roche v. O'Brien, 1 B. & B. 353.

4 Murray v. Palmer, 2 S. & L. 486; Dunbar v. Fredenich, 2 R. & B. 317; Maloney v. L. Estrange, 1 Beav. 413; Adams v. Bradley, 1 J. & W. 51.

5 Mayer v. Bills, 16 Iowa, 586.

allowed afterwards to say that, that representation was incorrect, and that he was not a partner."¹ Where persons hold themselves out to the world to be partners they will be liable to third persons, and they are estopped from proving that any other relation exists, or from showing what the actual relation is. A person who holds himself out as a partner, inducing others to believe that he is such, and thereby secures credit for the supposed firm, is estopped from denying his liability as a partner for the debts incurred.² As the power of a partner to bind the firm is absolutely ended on the dissolution of the firm, it cannot be exercised for the purpose of binding his co-partners to the payment of a debt from which they have been discharged by the statute of limitations, or in any other manner. No party can be at once plaintiff and defendant; hence a firm which is promisee of a note is estopped from bringing an action against a firm that are promissors if any person is a member of both firms, although no partnership may exist between them.³ Yet where two persons are joint owners of a vessel, against which a claim exists for non-delivery, and one gives a note in the joint name for a balance agreed, on as due for such non-delivery, the other party being aware of the making of the note, and of the consideration for which it was given, and making no dissent from the act of his co-owner, such note cannot be repudiated by such other party, he having bought out the share of his co-owner in the vessel, and agreed to pay her debts and liabilities.⁴ A. and B. were partners in a grist mill, to which was permanently attached a circular saw mill, in which C., who had no interest in the real estate, held an interest. A. and B. sold, and by their joint deed conveyed the entire property, including, with C.'s assent, the saw mill. Held in a suit by C. against A., the surviving partner, to recover the value of the saw mill, that the latter was estopped from denying his acquiescence in the sale.

¹ *Ness v. Anger*, 3 Exch. 813.

² *Kirk v. Hirtman & Co.*, 63 Penn. ; *Conklin v. Barton*, 43 Barb. 435.

³ *Newell v. Nixon*, 4 Wal. 573.

⁴ *Pence v. McPherson*, 30 Ind. 66.

SEC. 492. A partner may be estopped from saying that there was no partnership. Thus, in an action by an endorsee against the acceptor of a bill of exchange, purporting to be drawn by a firm of several persons, if the declaration avers that certain persons using that firm drew that bill, but the evidence is that the drawer of the bill trades singly under that firm name, and that he has no partner, this is not a variance of which the defendant can take advantage, because, by accepting the bill he is estopped from saying that it was improperly drawn.¹ So where a bill is drawn by the firm upon and accepted by one of its members, in an action by the payee against the drawers, the defendants are estopped from setting up as a defense any irregularity in the drawing. Under such circumstances proof that the bill was accepted is sufficient evidence of its having been regularly drawn.²

SEC. 493. When an agreement is void for infancy or coverture, an estoppel founded solely upon it must be equally void.³ The law throws its protection around infants and *feme coverts*, and they cannot be made liable to contract by their own representations.⁴ A void contract cannot be made obligatory by a false statement of the fact which awards the contract. "A husband and wife," said Pollock, C. B.,⁵ are liable for frauds committed by her on any person; as for any other personal wrong. But when the fraud is directly connected with the contract of the wife, and is the means of effecting it, and parcel of the same transaction, the wife cannot be responsible, and the husband be sued for it together with the wife. If this were permitted the wife would lose the protection which the law gives her against contracts, made by her during coverture; for there is not a contract a *feme covert* could make whilst she knew her husband to be alive, that could not be treated as a fraud. For every such contract would involve her in a fraudulent repre-

¹ Bass v. Clive, 1 Camp. 78; Wilde v. Keep, 6 C. & P. 325.

² Porthouse v. Parker, 1 Camp. 82.

³ James v. Landon, Cro. Eliz. 37.

⁴ Cannan v. Farmer, 3 Exch. 698.

⁵ The Adelphi Loan Ass'n v. Fairhurst, 9 Exch. 422.

sentation of her capacity to sue. A minor will be estopped by receiving the proceeds of a void sale, unless he repays on arriving at full age.¹ And the same estoppel applies when the fruits of a void conveyance, made by a husband of land belonging to his wife, are received and enjoyed by her after his death.² In the application of the principles of equitable estoppel there is no exception in the case of married women.

SEC. 494. An infant was held for the same reason, as in the case of a *feme covert*, could not be made liable for a fraudulent affirmation, that he was of full age, whereby the plaintiff was induced to contract with him.³ When the circumstances are such that there can be no direct responsibility for a fraud there can be no estoppel indirectly. But where infants and *feme coverts* cannot contract, there is no reason why they should be allowed to injure others with impunity.⁴ An estoppel may arise to prevent them from profiting by their own wrong or fraud.⁵ It has been held that neither infancy or coverture will operate as an excuse for conduct calculated to mislead purchasers,⁶ and that a married woman who unites with her husband in an assignment of her choses in action cannot subsequently assert her equity to a settlement against the assignee.⁷ A *feme covert* was held to have lost her right to enforce her equity of redemption by acquiescing in the improvement of the mortgaged premises by a purchaser from the mortgagee,⁸ while a union of a wife with her husband in an application of a third person to buy a mortgage, gave it a preference over a prior marriage settlement in her favor.⁹

SEC. 495. But when the question is not, whether a married woman shall be aided in the assertion of an equitable right

¹ Commonwealth v. Sherman, 18 Penn. 343 Smith v. Warden, 19 Penn. 421.

² Tilton v. Nelson, 27 Barb. 598.

³ Johnson v. Page, 1 Lid. 258; 1 Keb. 913.

⁴ Fitts v. Hall, 9 N. H. 441.

⁵ Evans v. Bucknell, 6 Ves. 174; Fulton v. Moore, 25 Penn. 468; Drake v. Glover, 38 Ala. 382.

⁶ Davis v. Trexel, 8 B. Monroe, 343.

⁷ Wight v. Arnold, 14 B. Mon. 458.

⁸ Higgins v. Ferguson, 14 Ill. 463.

⁹ McCullough v. Wilson, 21 Penn. 476.

or interest, but whether her legal rights shall be taken away or restrained, equity will follow the law and refuse to hold that the disabilities which it imposes for wise ends, can be removed even for the prevention or redress of fraud. The cases where a married woman may be estopped by standing by while her property is sold without warning the purchaser, is only in cases where her power over the property is unfettered and may be exercised without the assent of her husband. A married woman was not estopped by a deed fraudulently antedated to deceive a purchaser with the belief that she was sole, where she sets up coverture as a defence. While an equitable estoppel may be as effectual as a deed, it cannot be binding where a deed will be void.¹ When a tort is so involved with a void contract, and would not have occurred if the contract had been performed, and the wrong consists in the breach of the contract, the defect is vital and cannot be obviated by a change in the form of action. This is the well settled law of England and Pennsylvania.² A married woman will not be estopped by a failure to expose facts of fraud or misconduct on the part of her husband, in which she does not share, or even to point out that property which he is disposing of as his own belongs to her, for the reason that the law will presume that she was swayed by his influence or restrained by fear of giving him offense.³

SEC. 496. Due regard should be had to the age of a minor in deciding upon his responsibility for what he has said or done, and he ought not to be estopped from asserting his rights, unless there is sufficient ground for believing he knew of their existence, and was aware of the injurious effect which his conduct might have upon others.⁴ But while it has been the almost universal rule that estoppels do not apply to infants⁵ and *femes covert*.⁶

¹ Lowell v. Daniels, 2 Gray 161; Keen v. Coleman, 39 Penn. 222.

² Keen v. Hartman, 48 Penn. 497.

³ Bank of U. S. v. Lee, 15 Pet. 107; Drake v. Clover, 30 Ala. 382; Palmer v. Goss, 1 S. & M. 48; McClure v. Douthitt, 6 Penn. 414; Gatling v. Rodman, 6 Ind. 289. ⁴ Drake v. Clover, 30 Ala. 382.

⁵ Jackman v. Wood, 25 Cal. 153; Gould v. Kerr, 42 Barb.; Brown v. McCune, 5 Sand. 224.

⁶ Morrison v. Wilson, 13 Cal. 494; Lowell v. Daniels, 2 Gray, 161; Keene v. Coleman, 39 Penn. 299; Concord Bank v. Bellin, 10 Cush. 276; Gliden v. Struppler, 52 Penn. 400; Rangely v. Spring, 22 Maine, 130.

SEC. 497. Equitable estoppels are held to apply to married women, and in some instances to infants. Thus, if a contract for the erection of a building is made by the husband, and the same is erected on the real estate belonging to the wife in her separate right, with her full knowledge, approbation and consent, and she does not disclose her interest, and, knowing that it is being done, takes no steps to prevent it, she will be estopped from setting up her rights as a defence to a mechanics' lien.¹

SEC. 498. If a married woman voluntarily makes admissions and representations in respect to her rights of property which deceive others, and induce them to give credit to the husband on the faith of the property, she will be precluded from asserting her claim against the rights of those who have trusted in and acted upon her admissions and representations.² If a wife permits an arbitration to proceed in the name of her husband, knowing herself to be the party in interest, she will be bound by the award;³ and acquiescence in a sale by a married woman, attended with the receipt of the price by her husband, was held to render the title of the purchaser valid.⁴ A person succeeding to the title of a married woman, is estopped from denying her competency to make the title, while on the other hand, the decisions seem to be quite as strong the other way. Thus, it is held, that though the wife be silent when she knows her husband is holding out her property as his own, she is not estopped⁵ even after the payment of the part of the purchase money, for the land in her presence, has been held not to prejudice her right to claim the land, after the termination of coverture.⁶ A devisee who, before real estate is assigned to her by the probate court, consents to the sale by the executor to settle the estate, and to confirm the sale, quit-claims

¹ Swartz v. Saunders, 46 Ill. 18; Higgins v. Ferguson, 14 Ill. 269; Donaldson v. Holmes, 23 Ill. 85.

² Cravens v. Booth, 3 Tex. 243.

³ Smith v. Sweeney, 35 N. Y. 291.

⁴ Morris v. Stewart, 14 Ind. 334.

⁵ Drury v. Foster, 2 Wallace, 24; Bank of U. S. v. Lee, 13 Pet. 10; Bemis v. Call, 10 Allen, 512.

⁶ Delancey v. Keene, 1 Wash. C. C. 354.

to the executor, three days afterwards is estopped from setting up title in herself, adverse to executor or his vendee.¹

SEC. 499. The contract of a married woman being void, it cannot be ratified unless by deed in the mode prescribed by the statute. Positive acts of encouragement which might operate to estop one *sui juris*, will not affect one under legal disability ; and a wife can do or forbear to do an act to affect her property, unless settled to her separate use. Thus, a married woman, by agreement signed only by herself and without acknowledgment, contracted to sell land : she received one year's interest and a small part of the purchase money. The purchaser took possession and made improvements with her knowledge and encouragement. It was held, that she was not estopped from recovering the land.² When a married woman keeps a boarding house with the consent of her husband and controls the entire business, contracts of purchase made by her for the purpose of such business must be considered as contracts in relation to her sole property, and therefore binding upon her.³

SEC. 500. The principle that a party cannot impeach a judgment on any ground which might have been pleaded or relied on as a defense to the suit, does not apply to a case when the defendant is a *feme covert*, and not *sui juris*.⁴ A married woman is not estopped by confessing judgment from afterwards denying that the debt enured to her benefit.⁵

SEC. 501. As a general rule, infants are not bound by estoppels. Even where an infant represents himself as being of full age, he is not estopped from setting up infancy as a defense to a contract entered into under such fraudulent representation.⁶ But this has not been the case in Texas.⁷ After an infant has become of age, he may take a course which will estop him from denying that his acts have been confirmed. Also, if an infant suffers another to purchase his property

1 Crary v. Hall, 28 Vermt. 364.

2 Glidden v. Strupler, 52 Penn. 400.

3 Tillman v. Shakelton, 15 Mich. R. 447.

4 Griffith v. Clarke, 18 Md. R. 457 ; Bridges v. McKenna, 14 Ib. 258.

5 Barnes v. Burbridge, 15 La. An. 628.

6 Merriam v. Cunningham, 11 Cush. 40 ; Briely v. Russell, 10 N. H. 184.

7 Kilgore v. Jordan, 17 Tex. 341.

without informing such person of his ownership, he cannot recover the property of the purchaser.¹ An infant of the years of discretion, standing by and seeing his property mortgaged, saying nothing, cannot afterwards claim the property as his.² An infant cannot retain the benefits of his contract and thus affirm it, after becoming of age, and then plead infancy to avoid the payment of the purchase money.³ In all cases of judicial acts of a court under an authority not derived from an infant, they are binding and conclusive.⁴ And a judgment against an infant in cases of *tort*, or contracts which are absolutely binding upon him, is as conclusive upon him as upon an adult. And in partition a judgment is binding upon an infant where the judgment is regularly entered upon the appearance of the infant, by his guardian *ad litem*.⁵ Where a person dealing with an heir or reversioner shows that the transaction is reasonable and that a fair price has been given, either for a reversionary interest, annuity, or post obit bond, a court of equity will not in the absence of fraud set it aside.⁶

SEC. 502. The deed of an infant, purporting to convey lands, operates to transmit title and is voidable only, not void. It is not necessary to the affirmance of an infant's voidable deed, that the act affirming, should be as solemn in character as the original act itself.⁷ Where the heirs after coming of age with full knowledge of the facts receive and retain their share of the purchase money from a sale by their guardian of their interests in lands, they thereby estop themselves from questioning the validity of such sale on the ground of defects in the proceeding.⁸

¹ Hall v. Simonds, 2 Rich. Eq. 120 ; Morris v. Wait, 2 Rich. Law, 148 ; 2 Kent, 253.

² Irwin v. Merill, Dud. (Geo.) R. 72.

³ Henry v. Root, 33 N. Y. 526.

⁴ Brown v. Armistead, 6 Rand. (Va.) 574 ; Mills v. Dennis, 3 John's. Ch. 367.

⁵ Crogan v. Livingstone, 17 N. Y. 218 ; Althouse v. Radde, 3 Bosw. 410.

⁶ Dews v. Brandt, Sel. Ch. Ca. 7 ; Batty v. Lloyd, 1 Vern. 141 ; Wharton v. May, 5 Ves. 27 ; Curling v. Townsend, 19 Ves. 634 ; Lord Alborough v. Tyre, 7 C. & F. 436.

⁷ Irvine v. Irvine, 9 Wall.

⁸ Deford v. Mercer, 24 Iowa 118 ; Paisly v. Hays, 17 Id. 310 ; Thillate v. Stanly, 14 Ind. 409 ; Adlum v. Yard, 1 Rawle, 171 ; Commonwealth v. Sherman admsrs., 18 Penn. 343 ; Smith v. Warden, 99 Penn. 446.

SEC. 503. Where a person having title to property, of which he is apprised, stands by and suffers it to be sold by the sheriff, without asserting his title or making it known to bidders, he cannot afterwards set up his claim, and, in such case, even infancy would be no protection, provided the mind had arrived at those years of discretion when a fraudulent intent could reasonably be imputed to him.¹ Where land was conveyed fraudulently as against creditors, and a creditor of the grantor sued him, and was about to levy on the land, and thereupon it was sold for a fair price, and a large part of the sum received was paid to the creditor, he could not object to the purchaser's title.² Where land is devised to A. subject to the maintenance of his mother, and he allows her to sell, joining her in the deed, and requests the purchaser to make the notes for the unpaid part of the price to her; he is estopped from setting up a claim for the purchase money, and, though he caused the notes to be so executed to defraud creditors, he cannot question her title to them.³

SEC. 504. Where husband and wife separate under articles in which he covenants that he will not claim or demand any property which she shall thereafter own or acquire, and he is accordingly relieved during her life from her support, he is estopped from claiming a life estate in one-third of her real estate after her death.⁴ The concurrence or acquiescence of a husband in a settlement, though he be a minor, will preclude him from taking any objections to it.⁵ If a husband acquiesces in, or confirms, a settlement, he will not afterwards be allowed to dispute it.⁶

SEC. 505. The acts and admissions of one of several administrators which amount to an estoppel against him binds

¹ *Whittington v. Wright*, 9 Geo. 23.

² *Seymour v. Lewis*, 2 Beasl. 439; *Gottschalk v. De Santu*, 12 La. An. 473; *Mullen v. Follain*, ib. 838.

³ *Hunt v. Coon*, 9 Ind. 537.

⁴ *Slocumb v. Glubb*, 2 Bro. C. C. 515.

⁵ *Maber v. Hobbs*, 2 Y. & C. Exch. Ca. 317; *England v. Downs*, 2 Beav. 554; *Ashton v. McDougall*, 5 Beav. 56; *Grazebrook v. Percival*, 14 Tu. 1104; *Loader v. Clarke*, 2 Mac. & Y. 382.

⁶ *Wallace v. Bassett*, 14 Barb. 92.

the whole.¹ Thus where one of several administrators was present at a levy upon the property of his intestate and furnished to the officers a list of the property, and was present at the sale and made statements to the bidders, although it did not appear that he acted fraudulently, it was held that he and the other administrators were estopped from proceeding against the officer as a trespasser.² Where a party is both administrator and guardian, and receives funds as administrator which belong to the guardian and fails to credit himself with it as guardian, he is estopped to deny that he received them as administrator.³ A legatee who has prayed the orphans' court to recommit a report to an auditor is estopped from alleging that such auditor was improperly appointed.⁴ The executors of a deceased principal are estopped from relying on his death as a revocation of the agency against a *bona fide* purchaser, where the act is *in pais* and may be done by the agent in his own name.⁵ The attorney in an execution who refuses to state whether he directs a sale of a particular chattel by instruction of his client, and challenged a suit against himself, is estopped from denying that he acted on his individual responsibility.⁶

SEC. 506. Where the administrator of an estate, who was also an heir and agent for the other heirs, and as such in possession, and had control and management of a lot, allowed a third party to obstruct a way adjoining the lot, by building a barn thereon without laying any claim to said way, but protested against the building extending over the lot, he is estopped from laying any claim to the way against the third party or his grantees.⁷ A private sale by an administrator in his individual capacity, of property of his intestates' estate, estops him from recovering the property from his vendee, but does not pass the title to the property out of the estate; and if the sale is perfected by delivery,

¹ Camp v. Mosely, 11 Fla. 171.

² Pondar v. Mosely, 2 Fla. 207.

³ Wilson v. Wilson, 17 Ohio, S. 150.

⁴ Ludlam's estate, 13 Penn. 188.

⁵ Ish v. Crane. 8 Ohio, S. 528.

⁶ Ford. v. Williams. 24 N. Y. 359.

⁷ Dodge v. Story, 39 Vt. 558.

and the administrator subsequently acquires possession, he is estopped from setting up against his vendees the invalidity of the sale made by himself.¹

¹ Bragg v. Massie's Adm'r, 38 Ala. 89.

CHAPTER XVIII.

ESTOPPEL AS APPLIED TO BOUNDARIES,

EASEMENTS, DEDICATION, ORAL PARTITION, AWARDS, ADVERSE POSSESSION.

SECTION 507. The principle of estoppel is applicable to the question of boundary.¹ As in case of verbal representation.² Or the acceptance of a warranty deed.³ Or the making of improvements.⁴ Also in case of assent for twenty years.⁵ Numerous questions have arisen between parties owning adjoining lands, from fixing the dividing lines between them or constructing division fences, separating them, where the operation of the doctrine of estoppel has been applied excluding the right to change these, if afterwards found not to conform to the true division lines. From the variety of decisions on the question of the application of this branch of estoppel to the location of boundaries, it will be necessary to refer to some of the numerous cases on this question in order to deduce any rules applicable to the subject. Thus, an enactment of the legislature establishing the boundary lines of the lands of the state estopped the state from denying that they were the true boundaries.⁶ The practical location of a boundary line and an acquiescence therein for more than twenty years is conclusive of the location of the boundary line, on the ground that it is evidence of the correct location of so high a nature as admits of no contradiction.⁷

¹ *Vosburgh v. Yeaton*, 32 N. Y. 563.

² *Speller v. Scribner*, 36 Verm. 245.

³ *Hodges v. Eddy*, 38 Verm. 327.

⁴ *Corkhill v. Lauders*, 45 Barb. 218.

⁵ *Reed v. Farr*, 35 N. Y. 113.

⁶ *Commonwealth v. Pejebseut Prop.*, 10 Mass. 155.

⁷ *Reed v. Farr*, 35 N. Y. 113; *Baldwin v. Brown*, 16 N. Y. 359; *Watts v. Gamahil*, 31 Geo. 290.

SEC. 508. The owner of property cannot recall a declaration or admission with regard to a boundary, on which third persons have relied in buying.¹ A proprietor who points out to a settler on land adjoining his own, a line as the true boundary, acquiescing and assisting him in a settlement and improvements thereon, is thereby estopped from afterwards asserting a claim to the land covered by the improvements, though a subsequent survey proved it to be his own land.² Where the description in a deed designates a piece of land as that conveyed, the description cannot be departed from by parol evidence of intent or acquiescence in another boundary, unless such an adverse possession is shown, as is in itself a bar to an ejectment.³ When the disputed or uncertain line is fixed and adopted by parol agreement of the parties, it is binding upon them, their heirs, &c., not by way of transfer of title, but by way of estoppel.⁴ Where two adjacent owners had occupied for eleven years, on either side, up to a fence, as a division line, and one of them had gone on, with the acquiescence of the other, and made expensive improvements upon the land in his possession, it was held that the other was estopped from setting up the true line against the one who had thus expended his money; and the chancellor remarked, in giving the opinion, "perhaps a grant might be presumed within twenty years."⁵ Where land was surveyed with a view to partition among heirs, and the heirs conveyed the land according to the boundaries of such survey, and the husband of one of the heirs afterwards purchased an adjoining lot, which included a portion of the survey, it was held that the heirs were estopped to deny the boundaries so fixed, and that the husband was estopped to claim so much of the land surveyed as was included in the deed to him.⁶ Where A. was about to purchase a lot of land which adjoined B.'s, and was bounded by it, and not knowing the boundary line,

¹ *Robinson v. Justice*, 2 Penn. 19.

² *Jordon v. Denton*, 23 Ark. 704.

³ *Hubbell v. McCulloch*, 47 Barb. 287.

⁴ *Vosburg v. Yeaton*, 32 N. Y. 561.

⁵ *Adams v. Rockwell*, 16 Wend. 285; *Savarty v. Moore*, 32 Barb. 347.

⁶ *Root v. Crook*, 7 Penn. 378.

applied to B. to point it out to him, who did so, knowing that the inquiry was made with a view of purchasing it. A. having purchased it, relying on the statement of B., it was held that B. was estopped to deny that the line thus pointed out by him was the true one.¹

SEC. 509. A grantor is bound in his *private* capacity to a boundary line settled by him as trustee. He cannot acknowledge a line in one capacity, and be permitted to deny it in another. The government of the United states, as well as individuals, may be bound by estoppel. For instance, in the case of a mistake in the survey, and the parties building on the land ;² nor can the United States object to a boundary line in an approved survey, if they have not appealed from the decree approving the survey.³ A parol adjustment of boundaries, executed at the time and acquiesced in subsequently, will be as effectual as if it were by deed, and estops the parties from recurring to or enforcing their original rights. The estoppel of a parol designation of boundaries arises from the same cause which gave rise to that of a feoffment, with livery of seizure, both having their origin in the difficulty of having recourse to written instruments in unsettled countries, and a rude and primitive social condition.⁴ It is too late to correct an error in the boundary line after a building has been put up which would have been taken down if the error were corrected.⁵ An act of the legislature may operate as an estoppel, in regard to boundaries, but in North Carolina it is held that estoppels do not bind the state.⁶

SEC. 510. A party is estopped to deny the line between his own and the adjoining land to be the true line, if he has sold and conveyed land up to such line, has pointed it out as the true line, and has induced the defendant to purchase up to such line.⁷ If a disputed boundary line has been

¹ Speller v. Scribner, 36 Vt. 247; Richardson v. Chickering, 41 N. H. 380.

² Lindsay v. Haines, 3 Black. 554.

³ Alviso v. United States, 8 Wall, 337.

⁴ Sawyer v. Whiteside, 5 Yerg. 18.

⁵ Willis v. Swartz, 28 Penn. 413.

⁶ Candler v. Lundsford, 3 Batt. 407.

⁷ Richardson v. Chickering, 41 N. H. 380.

fixed and settled by agreement between the parties, and the defendant relying on such settlement has built upon the land so decided to be his, without any notice of dissent from the plaintiff in regard to the line thus established, the plaintiff will be estopped from denying that such line was the true boundary of their respective lots.¹ An acquiescence by a party in the dividing line between adjoining estates, may conclude a party by those boundaries as an admission, although not constituting a technical estoppel.² Where two neighboring owners of real estate have agreed upon a boundary line between their farms, and in accordance therewith cultivate their respective shares, each will be estopped from recovering against the other in trespass in contravention of the agreement but not in ejectment.³

SEC. 511. It has been held that a line agreed upon, or a division fence constructed by parties, if the same were done under a mistake, and the true line were afterwards to be ascertained, might be corrected.⁴ Thus,⁵ where the parties intending to establish the true division line between them, fixed the bounds indicating this line, and occupied their lands accordingly for more than twenty years. When the tenant, who had purchased of the original owner on one side of the line, was about to make the purchase, he inquired of the other owner as to the land, and was told by the latter, that he did not own beyond the line above mentioned. The tenant thereupon purchased and entered upon the land, filled it up, erected fences and buildings upon it, in the presence of the other owner, who frequently pointed out the line, and never objected to the acts of the tenant, nor gave him any notice that he claimed the land. It was, afterwards, by the decision of another case, ascertained that the line agreed upon and occupied was not the true line, and the party who had agreed to it brought an action against the tenant to re-

¹ *Corkhill v. Landers*, 44 Barb. 218.

² *Donnell v. Kelsey*, 10 N. Y. 412.

³ *Dewey v. Bordwill*, 9 Wend. 65.

⁴ *Prop. Liverpool Wharf v. Prescott*, 7 Allen, 494; *Thayer v. Bacon*, 3 Allen 163; *Coon v. Smith*, 29 N. Y. 392; *Baldwin v. Brown*, 16 N. Y. 359; *Bussell v. Maloney*, 39 Verm. 580.

⁵ *Brewer v. Boston & Wor. R. R.* 5 Met. 178; *Cook v. Babcock*, 11 C. C. 210.

cover the strip of land between the true and agreed line. And the court held, that he was not estopped by these several transactions, because the line was agreed upon in good faith, under a mistake of facts, and it was now ascertained where the true line was. The party made no declaration contrary to his honest belief at the time, or with any intention to deceive the tenant. The court, moreover, stated this broad proposition, which certainly is apparently at variance with more than one of the propositions contained in what has already been said: "A party is not to be estopped to prove a legal title to his estate by any misrepresentation of its locality, made by mistake, without fraud or intentional deception, although another party may be induced thereby to purchase an adjoining lot the title to which may prove defective."

SEC. 512. If, for instance, the line between two adjacent owners be in dispute, and the parties refer to arbitrators to determine the same, who hear and award upon the subject, the several owners will be bound to conform to such award.¹ But while the award of arbitrators as to such line would be binding upon the parties to it, no award as to the *title* to any part of such lands would be binding.² A mere agreement, though a mutual one, to employ a common agent to run a line and set up to the bounds between two proprietors would not estop either party from showing an error or mistake in this line.³ So where the deeds of the parties called for certain monuments, not then in existence, or a certain line which had not been run out on the face of the earth, and the parties came together and fixed the monuments, or agreed upon where the line should run, they would, if it was followed by occupation, be bound by their agreement, and estopped from claiming another. The distinction between these classes of cases is, that in the one, the parties, by mistake, agree upon a line where their mistake can be corrected, and the true

¹ Goodridge v. Dustin, 5 Met. 363; Whitney v. Holmes, 15 Mass. 152; Kellogg v. Smith, 7 Cush. 381.

² Vosburgh v. Yeaton, 32 N. H. 567; Jackson v. Dysling, 2 Cain R. 198; Kabberton v. McNeil, 12 Wend. 578; Terry v. Chandler, 16 N. Y. 356.

³ Thayer v. Bacon, 3 Allen, 164; Russell v. Maloney, 39 Vt. 580; Doe v. McCullough, 1 Kerr. (N. B.) 466.

line ascertained. In the other, they simply make that certain which had never before been determined. Thus, where the deed referred to a certain line not ascertainable by existing bounds, or known monuments. The adjoining owners agreed, that certain existing marks or monuments should indicate where the line was, and after that, occupied each to that line for a considerable length of time. The court held the parties bound and estopped by this as the true line. Among the cases referred to by the court, was a class where the parties, in fixing the *location* of their lands, agreed upon a certain line between them, if followed by an occupancy, will bind them by such agreement, if the line thus fixed had previously been ambiguous and uncertain.¹ Where the parties settled a disputed line by agreement, and occupied under it, it estops them.² If there is no way of ascertaining the true line, and the parties agree upon one, and mutually enter upon the occupancy of their lands in conformity to it, they make that the line and are mutually bound by it.³ Courts have held that parties who agree upon a line by mistake, would not be estopped to claim up to the true line, although the other party may in the meantime have erected buildings or incurred other expense upon the land which he claims.⁴

SEC. 513. While other courts, under similar circumstances, held that it would work an estoppel, if the party making the improvement would otherwise lose the benefit of the same.⁵ And again, such an agreement was held to be only *prima facie* evidence of what was the true line, but not conclusive.⁶ In New York on this subject it is held, if adjacent proprietors fix a boundary line between them, in which they both acquiesce, and to which they occupy for a long period,

1 Adams v. Rockwell, 16 Wend. 285; Jackson v. Ogden, 7 Johns. 238; Dibble v. Rogers, 13 Wend. 536; Chew v. Morton, 10 Watts. 321; Gray v. Berry, 9 N. H. 473; Orr v. Hadley, 36 N. H. 575; Lindsay v. Springer, 4 Harrint. 547; Rockwell v. Adams, 6 Wend. 467; Terry v. Chandler, 16 N. Y. 355; Daggett v. Willey, 6 Flor. 482.

2 Kipp v. Morton, 12 Wend. 127; Houston v. Sneed, 15 Texas, 307.

3 Sneed v. Osborn, 25 Cal. 624; Blair v. Smith, 16 Mo. 279.

4 Proprietors, &c. v. Prescott, 7 Allen, 496.

5 Corkhill v. Landers, 41 Barb. 228.

6 Gove v. Richardson, 1 Me. 327.

“rarely less than twenty years,” it is conclusive, and either party is estopped from offering any evidence to the contrary, “unless their acquiescence has continued for a sufficient length of time to become thus conclusive, it is of no importance.”¹ If, after an agreement as to the boundary one of the parties were to see a third party take a conveyance of the adjacent land for a valuable consideration according to the monuments agreed upon, he is estopped to claim adversely to such boundary.²

SEC. 514. It has been held that an admission by a party of a mistaken line for the true line, has no legal effect upon his title.³ An element of estoppel has been recognized as applicable to cases where the line had been agreed upon by mistake, and could be ascertained. “If during such acquiescence, expensive improvements, by the erection of buildings or otherwise, had been made by the occupant of the premises in dispute, the owner would have been estopped from setting up the true line.” So that, if this be law, it is not the agreement of the parties, nor the occupying under it, nor the good faith with which this was done, but the amount of money, whether much or little, which the tenant may have expended upon the land.

SEC. 515. A state as well as an individual may be bound by the acts of its legislature, as where by an act it fixes the boundaries of certain lands, it estops the state from denying the boundaries; and where the legislature grants to a county, city or town, for ever the use of certain lands for the benefit of the grantee, it parts with all interest in the lands, and is estopped from claiming them under a forfeiture of condition broken before the grant is made. There may be an estoppel *in pais* as to the boundary line between the adjoining proprietors, although no agreement may have been made between them as to the location actually made; nor is it essential that the proprietor claiming the benefit of the estoppel should enclose up to the line. It is sufficient if it would

¹ Reed v. Farr, 35 N. Y. 117; Baldwin v. Brown, 16 N. Y. 359; Doe v. McCullough, 1 Kerr. (N. B.), 460; Sneed v. Osborn, 25 Cal. 626; Boyd v. Graves, 4 Wheat, 517; Prop. Liverpool wharf v. Prescott, 7 Allen, 496.

² Colley v. Norton, 19 Me. 412.

³ Crowell v. Beebee, 10 Verm. 33.

work a practical fraud upon him to allow the other to disturb a location made and acquiesced in by himself.¹ To estop A. from denying a boundary line, orally agreed upon between him and B., it is not necessary that he should have intentionally made false statements to B., by which the latter was induced to put improvements on the land, nor that knowing his rights he should have agreed to a line by which he relinquished part of his land to B. But he is estopped where, understanding that there is an uncertainty about the true line, he agreed to the one fixed, and allowed B. to erect valuable improvements, which B. would lose but for such estoppel.²

SEC. 516. Practical location of a boundary line, and acquiescence in for more than twenty years, are conclusive evidence of the location of the line being proof of the correctness of such location, of so controlling a nature as to preclude all evidence to the contrary.³ Where a description in a deed of a piece of land as that conveyed, the description cannot be departed from by parol evidence of intent, or acquiescence in another boundary, unless such adverse possession is shown as is in itself a bar to an action of ejectment.⁴ Where a man, instead of making and recording a homestead, continually treats, uses and recognizes, or holds out to the world as such homestead a particular tract of land, forty acres, on which he resides, and third persons are influenced by his actions, his wife cannot be allowed years afterward to change the boundaries so as to affect or impair a security valid when it was given.⁵ When the recorded plats of adjoining additions to a city represent a street as located partly upon each of such additions, and running along the line between them, with nothing to indicate that there is any land included within the street lines not belonging thereto, the owner of one of such additions and those claiming under him are estopped, as against purchasers of lots on the oppo-

¹ *Lindell v. McLanghlin*, 30 Mo. 28.

² *Gove v. White*, 23 Wis. 282.

³ *Watt v. Ganahl*, 34 Geo. 290; *Reed v. Farr*, 32 N. Y. 113.

⁴ *Hubbell v. McCulloch*, 47 Barb. 287.

⁵ *Thompson v. Pickel*, 20 Iowa, 490.

site side of such street, who purchased for value after the plats were recorded, and without notice of his rights, from asserting title beyond the actual centre of the street as represented.¹

SEC. 517. The ordinary doctrine of estoppel by deed applies in case of a grant of an easement, so that if a person without title professes to convey or grant an easement, his conveyance operates by way of estoppel, if at a subsequent period he acquires the fee, and the subsequently acquired estate is bound thereby—the newly acquired estate feeds the estoppel. Where the owner of an estate has stood by and seen another expend money upon an adjacent estate, relying upon an existing right of easement in the first mentioned estate, and without which such expenditure would be wholly useless and wasted, and has not interposed to forbid or prevent it, equity will enjoin him from interrupting the enjoyment of such easement. So where one by parol grants a right to such easement in his land, upon the faith of which the grantee has expended money, which will be lost and valueless if the right to enjoy such easement is revoked, equity will enjoin the grantor from preventing the use of the easement. An easement is a liberty, privilege, or advantage in land, without profit, existing distinct from an ownership of the soil.² Such a privilege or liberty, open to the community, is a public easement, of which highways are the most common instances. A highway may be created by legislative authority, exercised either directly or through a municipal corporation, authorized by its charter to open streets, or through general road laws, which exist in most states, empowering justices or county courts to act upon the petition of the inhabitants; or it may arise from a dedication of the owner. Squares, walks, streets, &c., may also be the subject of dedication to the public.

SEC. 518. Dedication is the act of devoting or giving property for some proper object, and in such a manner as to conclude the owner.³ It does not operate as a grant, but is

¹ Weisbrod v. Chic. & N. W. R. R. 18 Wis. 35; S. C. 20 Id. 419.

² Pomeroy v. Mills, 3 Vt. 279.

³ Hunter v. Trustees, 6 Hill, 407; Connehan v. Ford, 9 Wis. 240.

in the nature of an estoppel *in pais*, which debars the owner from recovering it back. It may be made by parol, or presumed from lapse of time,² or by immediate presumption.³ The rule as to dedication at common law, is but the application of the doctrine of estoppel *in pais*. A dedication to the public use does not operate as a grant, but as an estoppel *in pais* of the owner of the servient estate from asserting a right of possession inconsistent with the uses and purposes for which the dedication was made.⁴ A party is as much estopped from acting fraudulently or unjustly with reference to property to which he has not strictly and technically a legal title, as with reference to property to which his legal title is perfect. So where a person has an equitable title, and the United States have the naked fee, he may convey and dispose of it as he pleases, and if he dedicates any portion of it to the public use, he is estopped from revoking such dedication to the prejudice of any individual or to the public. A party having no title or interest in land may estop himself by his deed from questioning the validity of his title, or denying that he had authority to convey the fee, or devote any interest or estate to public use at the time of the sale or dedication.

SEC. 519. This principle of estoppel *in pais* is applied in the case of a dedication of the use of one's land to the public as a public common, landing place or highway where private and individual rights have been acquired in reference to it. A dedication to pious and charitable uses may be effectual though not distinctively a public one, and if so made that the holder of the estate becomes a trustee for the purposes of a charity, no subsequent conveyance to one having notice could change the use. The grantee would himself become the trustee. But the mere erecting of a church for a religious society does not dedicate it. The owner may sell it

¹ Trustees v. Fox, 9 B. Mon. 209.

² Abbott v. Miles, 3 Vt. 521; Greely v. Quimby, 22 N. H. 338; Kennedy Ex'rs v. Jones, 11 Ala. 61; Schenly v. Commonwealth, 26 Penn. 29; Rogers v. East Mark, 11 Q. B. 887.

³ Larned v. Larned, 11 Met. 421; Noyes v. Webb, 19 Conn. 251.

⁴ Mankato v. Willard, 13 Minn. 13; Cincinnati v. White, 6 Peters, 431; Pawlett v. Clark, 9 Cranch, 331; Oleott v. Banfill, 4 N. H.

if he pleases. To effect such a dedication there must be a donation by the owner, or some unequivocal act united with an intent to divest himself to some extent of the ownership or power of control over the property, and to vest an independent and irrevocable interest in some other person or body.¹ The law considers such a state of things in the nature of an estoppel *in pais*, which precludes the original owner from revoking such dedication, for this would be a violation of good faith to the public, and to those who have acquired private property with a view to the enjoyment of the use thus publicly granted. But in accepting the dedication of a way the public take it as it is, and if defective or dangerous the public will be responsible.² If land has been dedicated and accepted as a public square for instance, and individuals upon the faith thereof have built their houses in reference to it as such, the dedication cannot afterwards be rescinded and revoked. Thus, where the commissioners of a county laid out a town for a county-seat, by a plot on which certain squares were indicated as "public lots," and individuals built around one of these, it was held that they might enjoin the erection of buildings upon the land thus set apart.³ Nor does the estoppel depend upon the length of time for which this use shall have been enjoyed.⁴

SEC. 520. There is no necessity for a grant or conveyance by deed or writing on the part of the owner of land in order to constitute a dedication. If he do such acts *in pais* as amount to a dedication, the law regards him estopped *in pais* from denying that the public have a right to enjoy what is dedicated, or from revoking what he has thus declared by his acts. There may be a dedication to the use of a town before it is incorporated, or to the public, or a body not capable of taking a grant. A dedication when once made to, and accepted by the public, is in its nature irrevocable.

¹ Attorney-General v. Merrimac Co., 14 Gray, 586.

² Robbins v. Jones, C. B. 26 L. Rep. 291.

³ Rutherford v. Taylor, 38 Mo. 315; Abott v. Mills, 3 Verm. 521; Wash. Ease. 2d Ed. 269.

⁴ Cincinnati v. White, 6 Pet. 438; Hobbs v. Lowell, 19 Pick. 405; Hunter v. Trustees, &c., 6 Hill 41; State v. Trask, 6 Verm. 355.

SEC. 521. All that is necessary to constitute a *good* dedication, is, that there should be an intention and an act of dedication on the part of the owner, and an acceptance on the part of the public. Whenever these concur the dedication is complete. When the dedication is accepted it takes effect, and the owner of the soil is thenceforward estopped from reasserting his ancient rights. Where land has been set apart for public use and private and individual rights acquired with reference to it, such setting apart is regarded as an estoppel *in pais*, precluding the original owner from asserting a right to the possession, although the fee may be in such owner.¹ If proprietors of land evince by their manner in laying it out, selling it, or appropriating it to the public or corporate uses, an intent to set it apart and devote it to the uses of a municipal, educational, religious or other corporations, their so doing is a dedication of the property to such uses, and they are afterwards estopped from resuming control over it.² It is a general rule that to constitute a valid common law dedication, there must be an intention to dedicate, and an act on the part of the owner, and an acceptance on the part of the public. This general rule is, however, subject to modification, that if the owner of a servient estate intentionally or by gross negligence leads the public to believe that he has dedicated the premises to public use, he will be estopped from denying the dedication to the prejudice of those whom he may have misled. If he shall do such acts *in pais* as amounts to a dedication the law regards him as estopped *in pais* from denying that the public have a right to enjoy what is dedicated, or revoking what he has thus declared by his acts, and a dedication once made and accepted by the public is in its nature irrevocable.³ The principle on which the binding and irrevocable nature of a dedication, of a street or highway rests is if it be laid out on the soil or a map, by authority of the owner of the land, and the resumption of that street or way would be a fraud upon any interests

¹ City of Cincinnati v. White, 6 Peters, 431.

² Hannibal v. Draper, 15 Mo. 634; Canal Trustees v. Harrison, 11 Ill. 551;

Atkinson v. Bell, 18 Tex. 474; Mayor, &c. v. Franklin, 12 Geo. 239

³ Wilder v. St. Paul, 12 Minn. 192.

acquired upon the faith of its being left open, the owner cannot revoke that appropriation, this dedication may be immediate, as if one owning land exhibit a map of it, on which a street is laid out, though not yet opened, and building lots be sold by him with reference to the front or rear of that street, or lots conveyed, being described as by streets, this is an immediate dedication of that street, and the purchasers of lots have a right to have that street thrown open forever.¹ This principle is not limited in its application to the single street on which such lots are situated, if it is shown that the opening of a street has induced others to become interested in such a manner, that the resuming of the soil would be a fraud upon them; and without such particular showing, lapse of time operates as affording a presumption that a revocation would be injurious to interests acquired on the faith of the streets being left open, and therefore would be fraudulent; the length of time for this presumption must vary with the circumstances, but it ought to be for such a length of time that the public accommodation and private rights might be materially affected by an interruption of the enjoyment.²

SEC. 522. Where defective proceedings are resorted to for the purpose of laying out a highway, and the land owner accepts the damage as awarded, he is estopped from contesting the validity of the highway, and the act may be regarded as a dedication,³ and if the owner of land intended and assented that the public should use it, and the public do so, that is a dedication.⁴ Neither compensation nor the intervention of a jury is required to determine the necessity of the taking, required to the valid dedication of property to the public use; acceptance alone is necessary. Authority to an agent to purchase a town site and lay out a town, is authority to lay out streets in such town, or to dedicate them to the public use, and the acts or representations of the agent with reference to the laying out and dedication of

¹ Wyman v. Mayor, 11 Wend. 481.

² Cincinnati v. White, 6 Peters, 431.

³ Karbar v. Nelles, 22 Wis. 215.

⁴ Gardner v. Tisdale, 2 Wis. 153; Holden v. Trustees, 23 Barb. 103; Dubuque v. Maloney, 9 Iowa, 455; Connehan v. Ford, 9 Wis. 244.

streets will bind the principal, particularly if it appears that such acts and representations were brought to his knowledge and were ratified by him. So a party whose land has been flowed for ten years or more by means of a dam across a navigable river, and who has acquiesced in the original construction and subsequent use and enjoyment of the water-power, and the repair and rebuilding of the dam from time to time, and thereby induced the making of valuable improvements to be used in connection therewith, is thereby precluded from maintaining an action to abate the dam, or to restrain the owners from rebuilding it when partially destroyed; but not from maintaining a common law action for his damages.¹

SEC. 523. A parol division of partition by coparceners or tenants in common, accompanied or followed by an exclusive possession of their respective shares has from a comparatively early period been held binding on grounds thought to be legal, but the origin is in fact due to the admission of purely equitable principles at common law.² Where commissioners appointed to make partition of real estate treat a portion of the property as part of a public street and make partition of the remainder, the acceptance of the parties to the suit of such partition estops them from denying that the portion not divided is a part of the street.³ A parol partition of real estate by tenants in common, followed by an exclusive possession are acts of ownership by each tenant respectively and are valid and binds the heirs.⁴ Where a plaintiff presents a sworn petition for a partition of lands which stated that he and others were tenants in common thereof and proceedings are had thereon he is estopped from denying that the others are his co-tenants, and cannot maintain trespass against them for entering.⁵

SEC. 524. There is one other act of parties which may

¹ Cobb v. Smith, 16 Wis. 661.

² McMahon v. McMahon, 13 Penn. 376; Wilkey v. Burney, 31 Miss. 644, Pratt v. Hubbell, 5 Ohio, 243; Baker v. Lorillard, 1 N. Y. 257.

³ McGregor v. Reynolds, 19 Iowa, 228.

⁴ Wood v. Fleet, 36 N. Y. 499; Norton v. Outland, 18 Ohio St. 383.

⁵ Van Arman v. Phelps, 9 Barb. 500.

operate in the nature of an estoppel, not in conveying a title to lands from one to another, but in quieting titles so as to estop any adverse claim, and that is by arbitrament and award, where the parties have submitted to arbitrators the question of property in lands, and an award upon the point has been made and published. Such award is conclusive as to their respective rights of property, even though the submission and award were by parol.¹ While the statute of frauds and the principles of the common law may preclude the transfer or extinguishment of a right to land, but by an award which has its origin in a parol submission, the transaction operates as an estoppel without passing the title and precludes either party from asserting in opposition to the award.²

SEC. 525. Adverse possession cannot originate or continue while the party actually occupies under a lease from the owner.³ A tenant under a lease from one having possession and control of the premises but no title to them (which lease contains a clause that in case lessors should cease to control or own the property no rent should be paid unless their successors in writing should confirm the lease) by holding under and paying rent to the successive assignees of the owner is estopped from denying that they are assignees of his original lessor, and continues bound to pay rent to them in that character or as having by the instruments of confirmation become new lessors.⁴

SEC. 526. A conveyance will not in general be presumed, where the original enjoyment was consistent with the fact of there having been none.⁵ But where the plaintiff produced an original lease of the premises for a long term, and proved possession for seventy years, the mesne assignments

¹ Doe v. Prosser, 3 East, 15; Goodridge v. Dustin, 5 Met. 363; Drustoe v. Yewre, Cro. Eliz. 223; Baker v. Townsend, 7 Taunt. 422; Shelton v. Alcock, 11 Conn. 240; Bowen v. Cooper, 7 Watts, 311; Shepherd v. Ryers, 15 Johns, 497; Carey v. Wilcox, 6 N. H. 177; Watson Arb. 38.

² Carey v. Wilcox, 6 N. H. 177; Clark v. Whithers, 19 Wend., 320; Merrick Est. 5 W. & S. 9; Shelton v. Alcock, 11 Conn. 240.

³ Corning v. Troy, 34 Barb. 485.

⁴ Whalin v. White, 25 N. Y. 462.

⁵ Doe v. Reed, 5 B. & Ald. 232.

were presumed.¹ And the jury were directed to presume that a grant regularly issued, where a certificate of recovery had been returned, and there were sundry conveyances of the land, and possession by persons claiming thereunder.² Presumptions of grants are founded upon the general infirmity of human nature, the difficulty of preserving muniments of title, and the public policy of supporting long and uninterrupted possessions. They may be encountered by contrary presumption, and can never fairly arise where all the circumstances are perfectly consistent with the non-existence of a grant.³ In general, the presumption of a grant is limited to periods analogous to those of the statute of limitations, in cases where the statute does not apply. Where the statute applies, the presumption is not generally resorted to; but if the circumstances of the case are very cogent and require it, a grant may be presumed within a period short of the statute.⁴ Peaceable possession of lands by a party, will form a presumption of title, on which a recovery in ejectment may be had against a mere intruder or trespasser, or any one who has entered upon the land, except the one having the real title.⁵

Where land was sold at execution sale, and the execution debtor in possession, leased the land to a third person after sale, the lessee cannot set up the title of the vendee, as a defence against the action of the lessor.⁶

SEC. 527. A tenant can never set up his possession as adverse to his landlord, so long as the relation of landlord and tenant continues to exist. Where the relation of landlord and tenant exists, a conveyance by the tenant of the demised premises cannot operate as the basis of an adverse possession so as to bar the landlord of his ejectment, whether the grantee know of the demise or not. Where the relation of landlord and tenant is established, it attaches to all who may succeed to the possession, through or under the tenant either imme-

1 *Earl v. Baxter*, 2 Black. 1228.

2 *Thornton v. Edwards*, 1 Har. & MeHen. 158.

3 *Jackson v. Manlius*, 2 Wend. 357.

4 *Richard v. Williams*, 7 Wheat. 59.

5 *Downing v. Miller*, 33 Barb. 386; *Hill v. Draper*, 10 Ib. 454.

6 *Wood v. Turner*, 8 Humph. 685; *Crustsinger v. Catlin*, 10 Ib. 21.

diately or remotely. And a purchaser who enters under an absolute conveyance in fee from the tenant, is considered as entering as the tenant of the lessor; although he may not have known that his grantor held or derived his possession from the lessor.¹ Although a tenant cannot deny his landlord's title, yet he may show that it has terminated, either by his own limitation or by conveyance, or by operation of law; after which he may disavow and disclaim the tenancy claim under another title hostile to that of his landlord, and make his possession adverse.² A tenant cannot set up an adverse claim which may operate to bar his lessor's title by adverse possession under the statute of limitations, until he shall have expressly disaffirmed such title of his lessor, and given him full notice that he claims to hold adversely thereto.³ Without such notice the law will presume the tenant holds in accordance with the demise under which he entered.⁴ The owner in fee of land cannot be dis seized by his tenant, but at his, the owner's election.⁵ In order to have a tenancy grow into one by sufferance, it must originally have been created by agreement of the parties, for where one was in, like a guardian, by act of the law, and held after his ward arrived at age, he was a tortfeasor, intruder, abator, or trespasser and not a tenant at sufferance.⁶ A tenant at sufferance is not admitted to question the title of his lessor in an action to recover possession of the land.⁷ Where a tenant, holding by deed to him as a tenant in common, ousts his co-tenant who brings ejectment for such ouster, the tenant cannot set up in defense an adverse title in a stranger.⁸ A *bona fide* purchaser holds adversely to all the world, and may dis-

¹ Jackson v. Davis, 5 Cow. 123.

² Nellis v. Lathrop, 22 Wend. 121.

³ North v. Barnes, 10 Vt. 220; Willison v. Watkins, 3 Pet. 49; McGinnis v. Porter, 20 Penn. St. 80; Lee v. Metherton, 9 Yerg. 315; Zeller v. Eckert, 4 How. 289; Sherman v. Champlain Trans. Co., 31 Verm. 177.

⁴ Bedford v. M'Elherron, 2. S. & R. 49; Jackson v. Wheeler, 6 Johns. 272.

⁵ Stearns v. Godfrey, 16 Me. 158.

⁶ Co Litt. 57 D. 2d. Inst. 134.

⁷ Jackson v. McLeod, 12 Johns. 182.

⁸ Braintree v. Battles, 6 Verm. 395.

claim the title under which he entered, setting up even against his vendor, any title whatever.¹

SEC. 528. A person who acquires his possession in such a manner as to owe allegiance to the reversioners, cannot set up an outstanding title purchased by him to defeat their rights. A possession acquired in subserviency to the title of the reversioners, cannot be defended as against them, by asserting a new title subsequently acquired. The general principle is that one in possession may purchase an outstanding title for the purpose of strengthening his own. The only qualification of this rule is, that his possession must not have been taken under circumstances which preclude him from disputing the title of the party claiming; and the qualification of the rule has its foundation in the law of estoppel, which will not allow a man to do what, in honesty and good conscience, he ought not to do.

SEC. 529. When a tenant in possession of a life estate in lands, purchases, of one of several *cestui que trusts* of the reversion, his undivided interests thereto, and suffers the land to be sold for a municipal assessment, and becomes the purchaser, he cannot hold the land for his exclusive benefit. He is bound to protect the interest of those who stand in the same relation of himself to the property, and cannot take a title, to their prejudice, but the title he receives enures to the common benefit. He cannot bring in a claim against the common property, and set it up adverse to the title of the common *cestui que trusts*.²

SEC. 530. One who takes a contract for the purchase of land is estopped from denying the vendor's title, and he cannot set up an adverse possession against the owner of such title; at least, until the vendee has fully performed the contract on his part, and become entitled to a legal conveyance. Where one is put in possession of land by another, the former is not at liberty to controvert the title of the latter until he has restored the possession so received, and placed the

¹ Croxall v. Sherered, 5 Wallace, 268.

² Burhans v. Van Zandt, 7 Barb. 91.

other party in as good condition as he was before he parted with the possession.¹

SEC. 531. An offer to purchase land by a party of another, is such a recognition of the title of the latter as will bar the defence of adverse possession. Accordingly, where the defendant took a lease of a parcel of land from the plaintiff, negotiated with him for the purchase of the adjoining strip of land, though he may show that the strip is included in the demise, he cannot set up adverse possession.² And generally, one who, while in possession of land, recognizes the title of another, and offers to purchase from him, cannot set up his own possession as adverse, although he will be permitted to show title out of such person, if the acknowledgment of title in him was the fruit of mistake or imposition; but he may not even do this if he entered the land under him.³ Repeated application of the defendant to the lessor of the plaintiff, to purchase the premises in question, affords a presumption that he came into possession under such lessor.⁴

SEC. 532. A party in possession of lands may be permitted to protect himself against litigation by buying in claims made by others, without invalidating his legal rights, or subjecting himself to any allegiance to others. As between vendor and vendee before conveyance, and between landlord and tenant, the possession must first be surrendered before the title can be questioned, or an adverse possession set up. There is no estoppel except where the occupant is under an obligation, express or implied, to restore the possession at some time or in some event. A party in the possession of lands acknowledging the title of another, is not estopped from subsequently disclaiming holding under such title, if the original entry was not under the person in whom the title is acknowledged; nor is any other person deriving the possession from such tenant, estopped by such acknowledgment.⁵ A party in possession of lands recog-

¹ *Burhans v. Van Zandt*, 7 N. Y. 523.

² *Jackson v. Britton*, 4 Wend. R. 507.

³ *Jackson v. Cuerden*, 2 Johns. Cases, 353.

⁴ *Jackson v. Croy*, 12 Johns. 427.

⁵ *Jackson v. Leek*, 12 Wend. 105.

nizing the title of a claimant, and agreeing to purchase, may subsequently deny such title, set up title in himself, and show that his acknowledgment was produced by imposition, or made under a misapprehension of his rights; but a party *entering* into possession, under an agreement to purchase, cannot dispute the title of him under whom he enters, until after a *surrender* of the possession. So long as the ordinary relation of vendor and vendee exists, the possession of vendee cannot be adverse to his vendor.¹

SEC. 533. When the heir apparent conveys land by deed, with covenants of warranty, and afterward inherits the property, he will be estopped from setting up an adverse possession against his grantee; but a purchaser at the sheriff's sale, under a judgment against the heir, under such circumstances, may claim an adverse possession against the grantee of such heir. This is upon the ground that an estoppel does not bind strangers. The heir, when he conveyed, although he had no title, by his conveyance recognized a title in his grantee and warranted the same to him; but the purchaser at the sheriff's sale is a stranger in respect to the matter that is alleged as an estoppel in the deed. He is not a party to it, and his title is in no way derived from it. He relies upon no act of the grantor, performed subsequent to the execution of the deed, to give validity to his title, and has in no way recognized the title of the judgment debtor's grantee. He is not, therefore, estopped from claiming an adverse possession against the grantee of the judgment debtor.² But a judgment debtor remaining in possession of land sold under the execution against him will not be allowed to set up an adverse possession against the purchaser at the sheriff's sale. And the possession of one holding under a judgment debtor by a conveyance subsequent to the lien of the judgment cannot be set up as adverse to the purchaser of the premises at sheriff's sale under such judgment.³ And one who enters under a title from a party subsequent to a judgment against him, through the title

1 Jackson v. Spear, 7 Wend. 401.

2 Jackson v. Bradford, 4 Wend. 617.

3 Jackson v. Collins, 3 Cow. 89.

comes to the party claiming in ejectment, cannot set up another title, but is estopped from denying the title of the judgment debtor from whom he took a conveyance and entered into possession.¹

SEC. 534. When two or more persons have a joint claim to property, the community of their interests creates a mutual obligation that neither shall do anything to the prejudice of the other. An expenditure by one upon the subject of their common interest enures to the benefit of all; and, on the other hand, all are bound to contribute toward that expenditure. Neither, will be permitted, without the consent of the others, to buy in an outstanding title, and appropriate the whole subject to himself, and thus undermine and oust his companion. "This," says Chancellor Kent, "would be repugnant to a sense of refined and accurate justice. It would be immoral, because it would be against the reciprocal obligation to do nothing to the prejudice of each other's equal claim, which the relationship of the parties created. Community of interest produces a community of duty, and there is no real difference, on the ground of policy and justice, whether one co-tenant buys up an outstanding incumbrance, or an adverse title, to disseise and expel his co-tenant."² And the same eminent jurist says in another case: "It is a general principle that, if a mortgagee, executor, trustee, tenant for life, etc., who has a limited interest, gets an advantage by being in possession or 'behind the back' of the party interested in the subject, he shall not retain the same for his own benefit, but hold it in trust."³

SEC. 535. The mutual estoppel between mortgagor and mortgagee, by which the mortgagor is estopped from setting up an outstanding title, whether originally adverse or arising from his own prior grant or mortgage against the mortgagee, and each compelled to hold in subordination to the rights of the other, is founded upon the same principle as that which exists between vendor and vendee, and grows out of the injustice of using a possession acquired for one

¹ Jackson v. Hinman, 10 Johns. 292; Burhans v. Van Zandt, 7 N. Y. 523.

² Van Horn v. Fonda, 5 Johns. Ch. 388.

³ Holbridge v. Gillespie, 2 Johns. Ch. 30; Baker v. Whiting, 3 Sumner, 176

purpose, for one of a different nature, to the prejudice of the party from whom it was received.¹

SEC. 536. To authorize the presumption of a grant, the enjoyment of the easement must not only be uninterrupted for the period of twenty years, but it must be adverse, not by leave or favor, but under a claim or assertion of right, and it must be with knowledge and acquiescence of the owner.² The exclusive use of flowing water for twenty years is a conclusive presumption of right.³ In Vermont, title acquired by fifteen years' adverse possession, is as perfect for all purposes as though derived by deed, and no parol transfer, surrender or declaration of the person so acquiring, can have any effect upon it. He can convey it only by a deed executed according to the requirements of the statute.⁴

SEC. 537. In cases of estoppel *in pais*, the rule of law merely attaches itself to the circumstances; when proved it is not deduced from them, it is not a rule of inference from testimony, but a rule of protection as expedient, and for the general good. It does not assume that all landlords have good titles, but it will be a public and general inconvenience to suffer tenants to dispute them. Neither does it assume that all averments and recitals in deeds and records are true, but that it will lead to great mischief if parties are permitted to deny them. It does not assume, that every man, quietly occupying land for twenty years as his own, has a valid title by grant; but it deems it expedient that claims, opposed by such evidence as the lapse of those periods affords, should not be countenanced; and that society is more benefited by a refusal to entertain such claims, than by suffering them to be made good by proof. In fine, it does not assume the impossibility of things which are posi-

¹ Anderson v. Crow, 5 Dana, 271; Reed v. Shepley, 6 Vt. 602; Wires v. Nelson, 26 Vt. 13; Barber v. Harris, 15 Wend.; Osborne v. Tunis, 1 Dutch. 633; Doe v. Clifton, 4 A. & E. 809; Doe v. Vickers, Id. 782.

² Flora v. Carbean, 38 N. Y. 111; Parker v. Foot, 29 Wend. 311.

³ Stillman v. White Rock Co. 3 W. & M. 539; Taylor v. Wilkins on, 4 Mason, 397.

⁴ Hodges v. Eddy, 41 Vt. 485; Austin v. Bailey, 37 Id. 219; Tracy v. Atherton, 36 Vt. 303.

ble ; on the contrary, it is founded, not only on the possibility of their existence, but on their occasional occurrence, and it is against the mischief of their occurrence that it interposes its protecting prohibition.¹

¹ Greenleaf on Evidence.

CHAPTER XIX.

ESTOPPEL AS APPLIED TO CORPORATIONS.

SECTION 538. A corporation, in the language of Chief Justice Marshall, is "an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of the law, it possesses only those properties which the charter of its creation confers upon it, either expressly or incidental to its very existence. These, are such as are supposed best calculated to effect that object for which it was created. Among the most important of these are, *immortality*, and, if the expression may be allowed, *individuality*.¹ A corporation being an artificial person and a creature of the law, is, to a great extent, governed by the same principles and rules as those which are applicable to natural persons. A corporation is liable to the same extent and under the same circumstances as a natural person for the consequences of its wrongful acts and omissions, and is responsible for the acts and negligence of its agents while engaged in the business of their agency, to the same extent and in a like manner and under the same circumstances as natural persons. The doctrine of implied agency arising out of negligence has its true basis in the principle of estoppel *in pais*, and is founded upon the injustice of allowing a party to be the author of his own misfortune, and then to charge the consequences upon others, and it implies an act in itself invalid, and a person forbidden, for equitable reasons, to set up its invalidity.² A corporation is bound by an estoppel, and has no more right to rescind a contract once legally made, than an individual has.³ The same presumptions

¹ Dartmouth College v. Woodward, 4 Wheat, 636.

² N. Y. & N. H. R.R. v. Schuyler, 30 N. Y. 30.

³ New England Car Co. v. Union India-Rubber Co. 4 Bl. C. C.

⁴ Jewett v. Town of Alton, 7 N. H. 257; W. F. L. Society v. Philadelphia, 31 Penn. 135; Swartz v. Faltouts, 14 La. 213.

which, by general rules of evidence, are continually made in respect to private persons and public officers, that all things are rightly done, are applicable to corporations.

SEC. 539. Persons acting publicly, as officers of corporations, are to be presumed to be rightfully in office. Acts done by the corporation, which presuppose the existence of other acts to make them legally operative, are presumptive proofs of the latter. Grants and proceedings beneficial to the corporation, are presumed to be accepted, and slight acts on their part which can be reasonably accounted for only upon the supposition of such acceptance of, are admitted as presumptions of the fact. If officers of a corporation openly exercise a power which presupposes a delegated authority for the purpose, and other corporate acts show that the corporation must have contemplated the legal existence of such authority, the acts of such officers will be deemed rightful, and the delegated authority presumed.

SEC. 540. The principle that when a contract is void, essentially from want of power or ability, it can be rendered valid by the aid of the doctrine of estoppel, is applied in full force when a body corporate transcends the limitations imposed by its charter, and the defect cannot be cured by the acts or representations of its officers or agents, or even by an express recital that an authority exists which is in fact wanting.¹ Redress must be sought in a suit to recover back the consideration, or an action on the case against the persons guilty of the fraud; although it has been held that an estoppel may grow even under these circumstances out of a long continued acquiescence in, or enjoyment of the fruits of the contract.² But where the authority exists, and the doubt is whether it was regularly put forth, or the conditions precedent to its exercise fulfilled, every intendment will be made, *ut res magis valeat*, and third person will not be acquired to look beyond the face of the proceedings, or

¹ Hood v. N. Y. & N. H. R. R. 22 Conn. 502; Treadwell v. Commissioners, &c. 11 Ohio S. 183; Hoople v. Brown, 13 Ohio, S. 311; Angell & Ames on Corp. § 256.

² Garrett v. Van Horne, 7 Ohio S. 397; Goshen Town v. Shoemaker, 12 Ohio, S. 624.

the recitals in the instruments under which they claim¹ an objection founded solely on the want of authority of the officers or agents by whom the act was done, or agreement made, may be removed by the subsequent ratification or acquiescence of the corporation.² Ratification of acts of a committee, by a corporation, will cure any defects in original appointment.³ A corporation cannot affirm an act of its agent in part, and disaffirm as to the residue.⁴

SEC. 541. A corporation is bound by a deed under its seal duly affixed, unless illegality or fraud can be established; and the defence resting on the *ultra vires* doctrine exists only when the corporation is prohibited by law from entering into the contract upon which the action is brought. "Corporations," said Baron Parke, in an often-quoted passage, "which are creatures of law, are, when their seal is properly affixed, bound just as individuals are by their own contracts, and as much as all the members of a partnership would be by a contract in which all concurred. But where a corporation is created by legislative enactment, *for particular* purposes, with special powers, then, indeed, another question arises, their deed, though under their corporate seal and that regularly affixed, does not bind them, if it appear by the express provisions of the statute creating the corporation, or by reasonable inferences from its enactments, that the deed was *ultra vires*; that is, that the legislature meant that such a deed should not be made. The question," continued the learned judge, "appears to me to be simply this:—Whether it can reasonably be made out from the statute that the covenant is *ultra vires*, or in other words, forbidden to be entered into by either the plaintiff's or defendants."⁵

¹ Parish v. Wheeler, 22 N. Y. 479; Moram v. Coms. of Miami, 2 Black. 722.

² Buckley v. Fishing Co. 2 Conn. 252; Peck v. M. & F. Ins. Co. 22 Conn. 557.

³ Madison Ave. Baptist Ch. v. Baptist Church, 2 Abb. Pr. N. S. 254; S. C. 32 How. Pr. 335.

⁴ N. Y. & N. H. R. R. Co. v. Schuyler, 34 N. Y. 30.

⁵ The Royal British Bank v. Turquand, 5 E. & B. 248; affirmed in error, 9 E. & B. 327; Shrewsbury & Birmingham R. R. Co. v. N. W. R. R. Co. 6 H. of Lord's cases, 113; Ager v. The Athenicum L.T. Assurance Society, 1 C. B. N. S. 725; Prince of Wales Assurance Co. v. Harding, 18 E. L. & L. 181; Bateman v. The Mayor, &c. of Ashton, 3 H. & N. 572; Simpson v. Westminster Palace Hotel Co. 6 Tr. N. S. 985.

SEC. 542. Corporations have the power to waive their rights, and are bound by estoppels *in pais* like natural persons.¹ When an association of persons, having assumed a name which implies a corporate body, exercise the power of a corporation, they are estopped from denying their corporate liability.² So a bank organized under a general banking law, is estopped to deny the regularity of its organization.³ So a corporation which has entered into contracts in its corporate capacity, is estopped when sued thereon to deny its corporate existence.⁴ A corporation is estopped from averring that officers who have acted as such were not elected at a meeting duly held.⁵ A corporation is bound by a contract which was originally unauthorized if it has been executed by the other party and they have received the consideration for their promise, and are estopped from repudiating their obligation, but the other party may enforce it.⁶ The president of a private corporation having as such executed a promissory note in payment for property purchased for the corporation, and being afterwards prosecuted and sought to be charged as a stockholder for the debt, he is estopped from denying the power of the corporation to make the purchase.⁷ So if a corporation in one action rely upon a certain instrument as their deed, they are estopped in another from denying its validity,⁸ nor can a corporation receiving the benefit of a loan avoid its liability upon a mortgage given to secure its payment by denying the authority of those who contracted in its behalf.⁹ A grant of a franchise, or any beneficial interest by the legislature to a corporation or a private person constitutes a contract between the government and the grantee which cannot be repealed nor essentially impaired by a subsequent legislature.¹⁰

¹ Hall v. Union Ins. Co. 32 N. H. 295.

² U. S. Express Co. v. Bedbury, 34 Ill. 459.

³ Ewing v. Robeson, 15 Ind. 26.

⁴ Callender v. Painesville R. R. 11 Ohio, 316.

⁵ Sampson v. Steam Mill Co., 36 Me. 78; Partridge v. Bdager, 25 Barb. 146.

⁶ Bissell v. S. & N. Ind. R. R. 22 N. Y. 258; DeGraff v. Am. L. Thread Co., 24 Barb. 375.

⁷ Moss v. Averill, 10 N. Y. 449.

⁸ P. W. & B. R. R. v. Howard 13 Howard, 308; Scaggs v. B. B. & W. 11 Md. 268.

⁹ Ottawa R. R. Co. v. Murray, 15 Ill. 336.

¹⁰ Charles R. Bridge Co. v. Warren B. Co. 7 Pick. 344.

SEC. 543. No person natural or artificial can enforce a contract that is void, illegal or contrary to the policy of the law. So a corporation cannot legally exercise any authority or power not expressly conferred upon it. Where a statute is passed creating new powers, and providing that any existing corporation may except it, and that on filing their acceptance, that part of their charter which is inconsistent with the act shall be repealed; if a corporation assume to act under the statute and exercise its powers, though without filing the acquired acceptance, they cannot exonerate themselves from responsibility upon contracts made in the exercise of such powers by objecting that they had not filed the evidence required by the statute to evince their decision to accept it. Although a corporation cannot vary from the object of its creation, and persons dealing with them must take notice of whatever is contained in the law of their organization; nevertheless in cases in which a corporation act within the range of the general authority, they may be bound though failing to comply with some regulation which should not have been neglected but has been.¹ So grantees who accept a statutory grant providing for an assessment of the damages of owners affected thereby, admit by such acceptance that such owners sustained damage.² While a corporation cannot relieve itself from responsibility to those to whom it may be indebted, by becoming merged into a new organization, it may by the act of merger become so situated as to be estopped from claiming that it remains undissolved. Persons associating and acting under the name, style and title of Express Companies, are estopped to deny that they are corporations,⁴ where a corporation imposes new assessments upon members it is estopped from denying that they are still members.⁵

SEC. 544. A lease taken by an individual in trust for a

1 *Zabriskie v. Cleveland*, 23 Howard, 381; *Lanesborough v. Catts*, 22 Pick. 320.

2 *People v. Law*, 34 Barb. 494.

3 *Carey v. Cincinnati R. R.* 5 Clarke, Iowa, 357.

4 *U. S. Express v. Bedbury*, 31 Ill. 459.

5 *Hyatt v. Esmond* 37 Barb. 601

corporation thereafter to be formed, creates, on the formation of such corporation, and upon its receiving an assignment of such lease, with knowledge of the terms upon which it was executed and received from the lessor by the individual lessee, a liability in equity, on the part of such corporation, to pay the rent to the lessor; and such liability cannot be avoided by a transfer of the lease by the corporation to a third person. Thus, after a lease had been made for the benefit of a partnership association, or such corporation as should be formed to succeed them, the lease being taken in the name of an individual upon an agreement to assign it upon request, the company were organized, took possession of the premises, and leased them for their own purposes. Held, that they had impliedly agreed to perform all the covenants of the lease, and to indemnify the nominal lessee against any liability on the same.¹

SEC. 545. Where a bank makes a certificate that a party has funds, it has the means of accurate knowledge, and it is estopped from denying the truth of the statement where parties rely on its statement.² Thus, where the teller or other proper officer of a banking corporation, representing it and doing its business at the counter, certifies the checks of its dealers and depositors drawn upon it, in the usual form, under a general power to certify, such banking corporation is responsible to holders of such checks in good faith and for value, notwithstanding private directions not to certify in the absence of funds without special permission.³

SEC. 546. It is sufficient evidence of the ratification by a bank of the unauthorized acts of its cashier, in assigning an account to other parties and taking their note in payment therefor, if it appears that the whole transaction is regularly and clearly entered on the books of the bank, subject to the inspection of committees of directors appointed to examine such books, whose report that the books are correct has been adopted by the board; and that such note is mentioned in the sworn reports made to the state bank comptroller, as a

¹ Van Schaick v. Third Ave. R. R. Co., 38 N. Y. 346.

² Irving Bank v. Weatherald, 36 N. Y. 335.

³ F. & M. Bank, etc. v. B. & D. Bank, 28 N. Y. 425.

part of the assets of the bank.¹ A subsequent ratification by the directors of a bank of the unauthorized act of its cashier, is equivalent to previous express authority ; and such ratification may be made by mere silence and acquiescence on the part of the board, after they receive knowledge of the transaction. Thus, where the cashier of a bank, without express authority for that purpose, gave a note in the name of the bank for a loan made to it, and the board of directors received and appropriated the money loaned ; or, at least, acquiesced in such appropriation, and suffered such note to be several times renewed, and several payments of interest to be made thereon, such acts on their part are a sufficient ratification of the note.²

SEC. 547. An insurance company is estopped from denying payment of premium, where there is an acknowledgment in the policy, unless they can show that the acknowledgment was made in error, by fraud or duress. So where the directors of an insurance company are empowered to determine the sum to be insured on any building, provided it does not exceed three-fourths its value, and by the powers vested in them have the right to determine the value of the building, when the company is sued for a loss under a policy, it is estopped from setting up that the sum insured by the directors exceeded the prescribed limit of value. When an insurance company after notice of a fire, by letter, from the insured, five or six days after its occurrence, sent an agent to investigate the loss, and such agent duly authorized, offered to compromise it, the company was held estopped from setting up, that the notice had not been sent forthwith as required by the policy.³ A statement in the instructions issued to agents that distilleries are not insurable does not estop the company from making a valid contract of insurance upon a distillery.⁴ Where the insurers,

¹ Racine Co. Bank v. Lathrop, 12 Wis. 466.

² Ballston S. Bank v. Marine Bank, 16 Wis. 120.

³ Michael v. Mutual Ins. Co., &c., 16 La. 737; Goit v. Nat. Protection Ins. Co., 25 Barb. 189.

⁴ Hoxie v. Prov. Ins. Co., &c., 6 R. I. 517.

⁵ Wyoming Ins. Co. v. Sheffer, 42 Penn. 188.

⁶ Citizens' Mutual Ins. Co. v. Sortwell, 8 Allen, 217.

by holding out to the assured hopes of an equitable settlement, have themselves caused the delay, they cannot take advantage of the stipulation in the policy that a suit shall be brought within twelve months after a loss and damage or the claim shall be barred.¹

Sec. 548. So where a policy requires notice to be given on all prior insurance, and that it be endorsed on the policy, and where the assured gave written notice of prior existing insurance, which the company failed to endorse on the policy, it was held that the company was estopped from setting up such prior insurance as a defense to an action on the policy.² The affidavit of loss made by insured estops him to deny in a subsequent suit on the policy any material facts therein stated.³ If a company see fit to renew a policy after it has full knowledge of the risk, any misrepresentation contained in the original application must be deemed waived; and the company are bound by the policy.⁴ Where an insurance company, with knowledge of the facts, accepts from the assured a premium for a renewal and renews the insurance, it will be deemed to have declared the contract of insurance valid, and to have waived a forfeiture, if any has occurred by reason of the omission of the assured to give notice of other insurance and have it endorsed on the policy. Under such circumstances the company is precluded from asserting either that the renewal was inoperative, or that the policy became void, immediately after it was renewed, by reason of circumstances of which it was fully cognizant at the time of renewal, on the principle of estoppel *in pais*. It makes no difference that the policy provides that none of its conditions "can be waived except in writing by the secretary." This provision may be rescinded or modified by a valid agreement even in parol, and the renewal of the policy has this effect.⁵ Where the insurers of property have, by their acts and conduct, acknowledged the interest in the premises of one who has paid to them a premium for a re-

¹ Grant v. Lexington Ins. Co., 5 Ind. 23.

² Foote v. Northwestern Ins. Co., N. Y. Sup. Court, 1862.

³ Irving v. Excelsior Fire Ins. Co., 1 Bosw. 507.

⁴ Witherell v. Maine Ins. Co., 49 Me. 200.

⁵ Carroll v. Charter Oak Ins. Co., 38 Barb. 402.

renewal of the insurance for another term, they cannot deny his interest in a suit to recover the insurance money for a loss occurring after such renewal.¹ An insurance company is estopped from using the defects in a survey which has been prepared by the company or its duly authorized agent as a means of escaping from the payment of the loss.² Though there can be no estoppel under these circumstances, unless the insured acted in good faith and was misled by the agent.³ An insurance company is estopped from taking advantage of the acts of its agents within the scope of their authority.

SEC. 549. If a policy of insurance is issued by an insurance company, upon a personal inspection and survey by its agent, without any written application on the part of the insured, or any fraud, misrepresentation, or any attempt to deceive the agent, or to prevent his acquiring a full knowledge of the nature and extent of the risk, the company is estopped from taking advantage of any mistake or omission of such agent in that respect.⁴ Where an insurance agent neglects to note on a policy other insurance which he takes, the company is estopped from setting up as a defense the failure to have such additional insurance noted on the policy.⁵

SEC. 550. Where the agent of an insurance company, who is notified in accordance with the conditions of the policy, of the state of the property insured and its title, but fails to express it on the face of the policy and says it makes no difference, that it is all right or words to that effect, and receives the premium, the act of the agent is such a waiver of the conditions named as amounts to an estoppel *in pais*.⁶

SEC. 551. One who accepts a policy of insurance, in which

¹ N. E. F. & M. Ins. Co. v. Wetmore, 32 Ill. 221.

² Plumb v. Mut. Ins. Co., 18 N. Y. 392; Howard Ins. Co. v. Brunner, 23 Penn. 60; Melville Iron Works v. Phoenix Fire Ins. Co. 25 Conn. 155; Harris v. Columbia Ins. Co. 18 Ohio, 166.

³ Smith v. M. Ins. Co. 24 Penn. 226.

⁴ Beal v. Park F. Ins. Co. 17 Wis. 241.

⁵ Horwitz v. Eq. Mut. Ins. Co. 40 Mo. 557.

⁶ Franklin v. Atlantic Ins. Co., 12 Mo. 156; Horwitz v. Equitable Ins. Co. 40 Mo., 557; Rowley v. Empire Ins. Co., 30 N. Y. 559; Atlantic Ins. Co. v. Goodall, 29 N. H. 182; Boehm v. W. F. Ins. Co., 35 N. Y. 151; Basche v. Globe Ins. Co., 34 Mo., 516.

it is expressly provided that it is agreed, and declared that the policy is made and accepted, upon and in reference to the application filed in the office, is estopped from denying that the application is his.¹ If, in drawing up an application, the agent acts as the agent of the company, and neglects to incorporate in it facts, which are essential to its validity, when he promises the applicant so to do, the company is estopped to set up the omission, for the purpose of defeating an action brought upon the policy.² Where the acts of the agent are within the scope of his authority, it is the same as if it is done by the company, and though statements contained in the application are untrue, the company is estopped from showing such to be the case.³ Where the preliminary proofs of loss by fire are served on, and received by the insurance company without objection, and the company base their refusal to pay, upon the ground that the risk had been increased, it is too late for the company to object on the trial, that the preliminary proofs were defective and insufficient.⁴ An insurance company, who have had the chance of a contract of life insurance turning out in their favor cannot afterwards be permitted, on the ground of its conflict with their rules, to escape from it.⁵ A person who contracts with an insurance company, and who is afterwards sued on his contract by the corporation, will be estopped from objecting that the company was not legally incorporated.⁶ Sureties on a bond given to secure the faithful performance of the duties of an agent, are estopped in an action on the bond from showing that the agency under which the breach of the bond is alleged to have been committed, was different from that described in their own instrument.⁷

SEC. 552. In a suit upon a premium note given to a mu-

¹ *Draper v. Charter Oak Ins. Co.*, 2 Allen, 569.

² *Kelly v. Troy Fire Ins. Co.*, 3 Wis., 254; *Clark v. Union Mutual Fire Ins. Co.*, 40 N. H., 333.

³ *Plumb v. Catt. Mut. Ins. Co.*, 18 N. Y., 392.

⁴ *Brown v. Kings Co. Fire Ins. Co.*, 31 How. Pr., 508

⁵ *Collett v. Morrison*, 12 Eng. L. & Eq., 171.

⁶ *White v. Coventry*, 29 Barb., 305.

⁷ *Wash. Ins. Co. v. Colton*, 26 Conn., 42.

tual insurance company, to recover an assessment thereon to pay a loss by fire. The maker after aiding to establish the corporation and partaking of its benefits is estopped to deny its legal existence in order to escape liability on his premium note.¹ If an insurance company with knowledge of breach of warranty in an application, which avoids the policy *ab initio*, make and receive assessments from the insured on his premium note; after the fire they will be estopped from setting up the breach of warranty in defense to an action on the policy.² So where the administrator after death of the assured paid assessments on the premium note for losses accruing subsequently to the death of the assured, the company were held estopped to deny the validity of the insurance after that event.³ So where an insurance company, with full knowledge of a forfeiture, collects assessments upon premium notes given by the assured for losses occurring after knowledge of such forfeiture, they thereby waive the forfeiture and are estopped from setting it up as a defense to an action on the policy.⁴ In an action on a premium note to a mutual insurance company, such notes furnishing the fund to which the other insured look for indemnity; the maker is estopped from denying that he had an insurable interest. He can only get rid of his note by surrendering his policy and taking it up; nor can he reduce his liability on the note, by setting up that he was only interested in part of the property described.⁵ Where a policy in a mutual insurance company was by its terms to be *suspended* if the assured should neglect for ten days to pay an assessment after it had been levied. Nearly fifteen months after the policy was suspended in consequence of the non-payment of two assessments, the assured sold the property to another party, and with the consent of the company assigned the policy to the purchaser, who at the same time executed a mortgage to the vendor and re-assigned the policy

1 Trumbull Co. Mut. Ins. Co. v. Horner, 17 Ohio, 407.

2 Frost v. Saratoga Mut. Ins. Co., 5 Denio, 151.

3 Tuttle v. Robinson, 33 N. H. 104.

4 Keenan v. Mo. State Mut. Ins. Co. 12 Iowa, 126.

5 N. E. Mut. Fire Ins. Co. v. Belknap, 9 Cnsh. 119.

to him with consent of the company. At the time of the sale and assignment of the policy the vendee was not informed of the defect in the policy by reason of the non-payment of the assessments. The directors of the company, not having spoken to him in regard to the defect, they waived it, and were estopped from setting it up, in an action for the insurance, to which the purchaser of the property had innocently trusted till the loss happened.¹ In an action by the receiver of an insolvent insurance company, upon an insurance premium note, the maker is estopped from setting up as a defense that the policy and note are void by reason of his misstatements or omissions at the time of procuring the policy.² One who affects an insurance with an incorporated company by the terms of whose charter he becomes a member of the corporate body, and gives a premium note in consideration therefor, payable to the company by its corporate name, is estopped from denying the corporate existence of the company in an action against him on the note.³

SEC. 553. Where a party sues and obtains judgment against a corporation, he is estopped from afterwards denying its corporate capacity in an action upon the judgment.⁴ Where a corporation makes an assignment and creditors claim under the assignment, they are estopped from asserting a claim upon the stockholders personally for the balance of their debts.⁵ But in Massachusetts, proving a claim against a corporation in insolvency and receiving a dividend is not a bar to a suit for the balance of the debt.⁶ A judgment is conclusive evidence of the indebtedness of a corporation to the plaintiff, and its validity cannot be inquired into, but a defendant may show that it has been paid.⁷ In Maine a judgment against a corporation is binding upon the stockholders until reversed, and is conclusive upon them in a subsequent suit by the same plaintiff.⁸ And a stockholder

¹ Hale v. Union M. Fire Ins. Co., 32 N. H. 295.

² Huntley v. Perry, 38 Barb. 569.

³ Cahill v. Kalamazoo Mut. Ins. Co., 2 Doug. (Mich.) 124.

⁴ Poehelow v. Kemper, 14 La. 308.

⁵ Van Hook v. Whitlock, 26 Wend. 43.

⁶ Coburn v. Boston Paper Mache Co., 10 Gray, 243.

⁷ Case v. Sandford, 14 Iowa, 235.

⁸ Milliken v. Whitehouse, 49 Maine, 527.

in a corporation is so far privy as to bring error to reverse a judgment, but until reversed such judgment is valid against him. There can be no affidavit of defense made against the judgment, it is conclusive against him. In Massachusetts to render a stockholder liable he must be summoned, but where he allows judgment to go by default, he is estopped from denying the existence of the corporation in a collateral action, or his liability, to be arrested as a stockholder upon the execution against the corporation.¹ A judgment of record recovered on a contract of a corporation cannot be impeached, on the ground that the contract was void for want of corporate power to enter into it.²

SEC. 554. Where a corporation takes property for private purposes under a void and unconstitutional act, a party receiving the amount of the damage assessed waives the benefit of the illegality, and the receipt of the money operates as an estoppel and has the same effect as a conveyance, and vests the title in the corporation. Where parties having a right to appear and object, but do not, but take the money for his damage, he and his heirs are estopped from claiming title to the property so taken. The receipt of the money is an express consent to the taking of the property, and estops the party and those claiming under him from alleging an unconstitutional taking of private property for private purposes,³ and that the title to such premises did not vest in the corporation. A property holder cannot quietly permit money to be expended in work which benefits his land, under a contract with the city, and then deny the power of the city to make the contract.⁴ Where several tax-payers petition the common council to cause certain improvements to be made, as grading, macadamizing, or paving streets, and the improvements or work is completed in compliance therewith, without complaint or objection on their part, to the acts of the contractor or common council, in relation thereto, they are equitably estopped to deny that the common

¹ *Richmond v. Willis*, 13 Gray, 18.

² *Bank of Wooster v. Stevens*, 1 Ohio St. 233.

³ *Sherman v. McKeon*, 38 N. Y. 275.

⁴ *Hellenkamp v. City of Lafayette*, 30 Ind. 192; *Palmer v. Stumph*, 29 Ind. 329.

council had no constitutional power to do it. It would be the perpetration of a gross fraud, after their willing and active assent; and when they impliedly consent that an assessment shall be made, to pay for such improvements, whether the assessment is illegal or not, they are estopped from asking a court of equity to interpose an injunction to restrain the collection of the tax.¹ And where an individual, whose land was appropriated for the purpose of a municipal corporation, was a member of the city council which authorized the improvement, one of those who petitioned them for the purpose, a member of the committee to whom the petition was referred, participated in the proceedings which resulted in the opening, and stood silently by while the city was making large expenditures upon the work, he was held not to have either a legal or equitable right to set up his title against the city.² Where a town which, by its officers, expends upon a road the means provided by law to make and improve highways, in order to make them safe for traveling, proclaims to the world that such road is one of its public highways, it is thereby estopped from denying it to be so in an action for the recovery of damages for injuries sustained through the neglect of its officers to keep such highway in repair.³

SEC. 555. A corporation may become bound and estopped, otherwise than under a corporate seal, and their undertakings and admissions may be evidenced otherwise than by records, resolutions, by-laws, ordinances, or other written documents. Technical as well as equitable estoppels apply to corporations as well as to individuals. The ratification of a contract by a corporation, may be inferred from facts attending the transaction, and where persons assuming to act as agents of a corporation, but without legal authority, make a contract and the corporation receive the benefit of it, and use the property acquired under it, such acts will

¹ *Motz v. City of Detroit*, 18 Mich. 496; *Brown v. Bowen*, 30 N. Y. 519; *Young v. Bush*, 8 Bosw. 1.

² *Mayor of Pittsburgh v. Scott*, 1 Penn. St. 309.

³ *Codner v. Town of Bradford*, 3 Chand. (Wis.) 291.

ratify the contract and render the corporation liable thereon.¹ Corporations, in regard to their contracts, are upon the same basis as natural persons, open to the same implications, receiving the benefit of the same presumptions.² Where a corporation is sued for an injury growing out of the negligence of the corporate authorities in their care of the streets of the corporation, they cannot defend themselves on the ground that the formalities of the statute were not pursued in establishing the street originally. If the authorities of a city or town have treated a place as a public street, taking charge of it and regulating it as other streets, they cannot, when sued for an injury, defend themselves by alleging want of authority in establishing the street.³

SEC. 556. A city is bound and estopped by acts of its officers within knowledge of its common council without objection.⁴ Thus where goods are legally purchased by the town agent, assuming the right to pledge the town's credit for the price, and the town afterwards receives them with a knowledge of the way in which they were purchased, the town is estopped from denying their liability.⁵ But where a contract under which work is done for a municipal corporation, is void; because entered into in violation of its charter, the contractor cannot recover for it in any form neither under the contract nor upon a *quantum meruit*, and a subsequent ratification of the contract before or after the work is done by the common council does not make it binding upon the corporation;⁶ nor is the corporation estopped from setting up a want of authority to make the contract.⁷

SEC. 557. When a county or other municipal corporation is authorized by statute to borrow money and issue bonds for the

¹ Bank of Columbia v. Patterson, 7 Cranch, 299; Gooding v. C. & S. R. W. Co. 17 Beav. 132.

² Bank of U. S. v. Dandridge, 12 Wheat, 70; Amherst Bank v. Root. 2 Met. 533; Western R. R. v. Babcock, 6 Met. 356; Burgess v. Pire. 2 Gill, 11; King v. Amory, 1 Tenn. 575.

³ Mayor, &c. v. Sheffield, 4 Wallace, 489.

⁴ Hasbrouck v. City of Mil. 21 Wis. 217.

⁵ 42 N. H. 125.

⁶ Brady v. Mayor of N. Y. 20 N. Y. 312.

⁷ City Council v. New Plank R. Co., 31 Ala. 75, 76.

payment of money thereof, and bonds are made and delivered, reciting the facts which show them to have been regularly issued, the county is estopped to deny their regularity, or to assert that they were not made in conformity to the statute.¹ If municipal bonds are valid by the constitution and laws of the state, as expounded by the highest judicial authority, whose duty it was to interpret them, they cannot be made invalid by a subsequent judicial interpretation of an opposite kind.²

SEC. 558. Such bonds being payable to bearer and bearing interest coupons, although not in the form of promissory notes or bills of exchange, are to be regarded as commercial securities, and the holder of them has a full title against one who has taken them in good faith, the county cannot set up the equities which might have been available against the original payee. The power to issue the bonds being shown, the corporation as against *bona fide* holders for value, is estopped to deny that the power was properly executed.³

SEC. 559. The fulfilment of the conditions or restrictions under which a body corporate is empowered to act, will be presumed until it is disproved, and that when they are alleged to have been fulfilled on the face of the instrument on which the suit is brought, the contrary cannot be shown as against a purchaser who has bought in good faith, and without notice of the irregularity.

When a corporation has power under any circumstances to issue negotiable securities, a *bona fide* holder has a right to presume that they were issued under circumstances which gave the requisite authority, and they are no more liable to be impeached for any irregularity in the hands of such a holder than any other commercial paper.⁴

SEC. 560. Where authority is given to a city to take stock in a railroad, *provided* that none should be taken "unless on

¹ Moran v. Commissioners of Miami Co. 2 Black. 722.

² Mitchell v. Burlington, 4 Wall, 270.

³ Rogers v. Burlington, 3 Wallace, 654; Cincinnati City v. Morgan, Id., 275; Moran v. Co. Coms., 2 Black, 722.

⁴ Gelpeke v. City of Dubuque, 1 Wallace, 203.

the petition of two-thirds of the citizens", this proviso will be presumed to have been complied with, where the bonds show, on their face, that they were issued in virtue of an ordinance of council of the city making the subscription, the bonds being in the hands of *bona fide* holders for value.¹ Thus where the common council of a city were authorized by a statute to issue bonds of the city in aid of a railroad, on the petition of three-fourths of the legal voters, the common council decided that such proportion had petitioned and issued the bonds to the plaintiffs. Duly certified copies of their proceedings were exhibited to the plaintiffs at the time they received the bonds; and upon the bonds themselves it was recited that three-fourths of the legal voters had petitioned for the subscription. Held that the bondholders and their assigns had the right to rely upon such recitals as importing absolute verity, and the city was estopped to deny that three-fourths of the legal voters had petitioned.² Where the municipality has repeatedly recognized the validity of the bonds issued by them, by paying them out, levying taxes and paying interest on them for a series of years, it is estopped from claiming that the issue is illegal.³ And the same principle applies in the case of coupon bonds in the hands of *bona fide* holders; the city is estopped in an action upon the coupon to deny the regularity of their issue.⁴ So, on a petition for a peremptory mandamus, to compel the trustees of a township to pay the overdue interest on certain bonds, issued by said trustees to a railroad company, incorporated by an Ohio statute, and endorsed by the petition. Held that the defendants were estopped to aver, as to third persons holding such securities in good faith, without notice, that the act of incorporation of said railroad company was abrogated by the new constitution of the state, and if not superseded, that the proceedings preliminary to the issuing of the bonds were not

¹ Van Hostrup v. Madison City, 1 Wall, 291.

² Bissell v. City of Jeffersonville, 24 Howard, 287.

³ Keithsburg v. Frick, 34 Ill., 405.

⁴ Clark v. City of Zanesville, 10 Wis. 136; Supervisors of Mercer Co. v. Hubbard, 45 Ill. 139.

complied with, as to notice of elections, &c.¹ The bonds of a municipal corporation, issued in aid of a railroad, were publicly sold, with a knowledge of all the inhabitants of the city. Many of them had been deposited with the State Treasurer by banks as security for their circulation, one of which, located in the city, had for several years published in a newspaper there a quarterly statement, embracing such fact. The city had paid the semi-annual interest on the bonds, down to a certain date, and the payments had been reported at the annual city meetings. Held under these circumstances that the corporation was equitably estopped from denying the validity of the bonds, against parties who held them in good faith, and that individual citizens and tax-payers who had acquiesced in the conduct of the city, and taken no measures to prevent the sale of the bonds, or the payment of interest, were equally estopped from denying their validity, so far as their individual rights were concerned.²

SEC. 561. A provision in a city charter restraining them from borrowing money for any public purpose, does not estop it from issuing bonds in payment for property purchased.³ The seal of a municipal corporation attached to a contract, does not estop the corporation from inquiring into the power of its officers to make it.⁴ But a municipal corporation is not estopped from maintaining an action upon a treasurer's bond, by accepting a report of an auditing committee who had approved his accounts by making a report founded thereon to the legislature.⁵ Where a bond reciting that a party has been appointed for a particular office, and that he should pay over all moneys collected, &c., the sureties are estopped from denying such a fact in an action on the bond, and their liability is co-extensive with the principals.⁶

¹ *State v. Trustees of Union Township*, 8 Ohio, St. 394.

² *Society for Savings v. City of New London*, 29 Conn. 174; *President, &c., v. Frick*, 34 Ill. 405; *Mayor v. City of Chicago*, 38 Ill. 266.

³ *People v. Brennan*, 39 Barb. 522.

⁴ *City of Leavenworth v. Rankin*, 2 Kansas, 357.

⁵ *Lexington & Cambridge R. R. Co. v. Elwell*, 8 Allen, 371.

⁶ *Mayor of Hoboken v. Harrison*, 30 N. J. Law, 73.

SEC. 562. Where a city, by its ordinances, has released all its rights in certain premises to the owner, and the owner's grantees occupy and improve the same on the faith of such ordinances, the city is estopped to claim the land.¹ Where money is raised by a town in pursuance of a statute, for the purpose of paying the interest due on bonds issued by such town, and the money is placed in the hands of the supervisor, who is required by statute to pay it over to the proper bondholders, such supervisor will be liable to an action by a bondholder for his share, and will also be estopped from alleging that the bonds are not legal.²

SEC. 563. Where a corporation have the power to do an act they may be estopped from objecting that the form they adopted was not the exact mode prescribed in the charter; but where the question is one of power, they cannot be deemed estopped to deny that they have done what they never could by legal possibility have done.³ But if the agents of a railroad company represents the company to the public as common carriers to a place beyond the limits of their own road, in such a manner and for such a time that the corporators may be presumed to know and assent to it, the company will be estopped to deny it, although no actual arrangements with connecting lines exist, although the company may have had no special authority by their charter to make such contracts, and could perhaps by proper proceedings, have been restrained from so doing. They cannot plead such want of authority against persons contracting with their agents, empowered so to contract by express act of the company or their directors, or by implication arising from a mutual arrangement amongst all the carriers between the place where the goods are received and the place where they are delivered, and although the agent making such a contract had no authority from the company to do so, yet if for several years before and after the transaction sued upon, he made similar contracts to deliver goods at various places beyond the line of the company's road, their assent

¹ Grant v. Davenport, 18 Iowa, 179.

² Ross v. Curtis, 31 N. Y. 606.

³ Hood v. N. Y. & N. H. R. R. Co., 22 Conn. 502.

may be presumed, and they will be estopped from denying their authority.¹

SEC. 564. A railroad company, having procured an assessment of the value of lands to be taken and appropriated to the use of their road, by persons mutually chosen by them and the ostensible owner, are estopped from denying his title on the ground that his sale to them was fraudulent and void as to creditors, without showing that they were creditors, that the title had failed, and that they had been evicted by some of the creditors, or that they had acquired a paramount title.² After land is condemned for the use of a railway company, the adjudication can no more be impeached by any collateral proceedings, or by evidence, than the judgment of any other court of competent jurisdiction.³ After a railroad has lawfully taken lands under their charter, and the damages have been duly assessed by their commissioners, and, upon appeal, the assessment has been confirmed and the amount received by the owner, he is estopped from setting up any claim against the company's possession, while the lands are used for any of the purposes authorized by their charter.⁴ So where a party acquiesces for a short period of time, whereby the company may infer that he intends waiving present payment, concludes the owner from afterwards stopping the company in the progress of their work or the running of the road.⁵ Where the legal title of streets in cities is vested in the municipal corporation, and a corporation has been authorized by competent legal authorities to construct railroads in or upon the streets of such cities, courts cannot interfere to prevent their construction.⁶

SEC. 565. Where one gives a railroad verbal permission to use his land, he is estopped from bringing a suit for damages for such use as long as the permission is unrevoked.⁷

1 Perkins v. Portland R. R. Co., 47 Maine; Penn. &c. Steam Nav. Co. v. Dandridge, 8 Gill, 5, 248.

2 La Cross & M. R. R. v. Seeger, 4 Wis. 268.

3 Hamilton v. Ann. & E. R. R. R. 1 Md. Ch. 107.

4 Dodge v. Burnes, 6 Wis. 514.

5 McAulay v. Western, &c., R. R. 33 Vt. 311.

6 Milburn v. Cedar R. R. 12 Iowa, 246.

7 Miller v. Anburn R. R. 6 Ill, 6.

A subscriber for stock in a corporation with an unconditional charter, will not be permitted, in a suit against him by the corporation for the recovery of instalments on his stock subscription, to inquire into and contest the validity of its charter.¹

SEC. 566. Fraudulent misrepresentations relative to the past earnings of a railroad, the pecuniary condition of the railroad company, and the value of its stock, made by the officers or agents of such company while acting for it, in obtaining subscriptions to its stock, must be deemed to be made by them in the execution of their agency, and the company will be held liable therefor.² A sale of property belonging to a railroad company made by the president without authority will be deemed ratified, if the fact that such sale had been made was communicated to the board of directors, and openly talked of at one of their meetings, and they did nothing to disaffirm it.³ A person who has given a note and mortgage to a railroad company in payment for its stock, is estopped from setting up in a suit thereon, that such transaction is a fraud upon cash paying subscribers. He cannot set up his own fraud to defeat his own contract, when the party defrauded choose to acquiesce in it.⁴

SEC. 567. A railroad company, against which a judgment for land damages has been rendered, was sold under a mortgage, and a new company organized. It was held that the new company entering upon the judgment creditor's land, and running trains was estopped to deny his claim and was liable on the judgment.⁵ A carrier who contracts with a corporation to carry goods, for it cannot defend an action for damages resulting from his negligence in transporting such goods, on the ground that the corporation cannot lawfully acquire title in them.⁶

SEC. 568. A foreign corporation is estopped from availing themselves of the statute of limitations as a defense to an

¹ Woods v. C. C. R. R. 32 Geo. 273.

² Waldo v. Chi., St. Paul & Fon Du Lac R. R., 14 Wis., 575.

³ Walworth Co. Bank v. F. Loan & T., 16 Wis., 629.

⁴ Clark v. Farrington, 11 Wis., 306.

⁵ Pfeiffer v. Sheboygan R. R. 18 Wis., 135.

⁶ F. & M. Bank v. Detroit & M. R. R., 17 Wis., 372.

action in the courts of the states.¹ When a foreign corporation, by its officers comes within the limits of any state, it becomes subject to the laws of that state, and to the process of the courts; and where such a corporation by its officers is guilty of a wrong or commits a trespass within such state, the corporation is estopped from setting up its existance under a foreign government as a means by which to escape the consequences of its illegal acts.²

SEC. 569. The question of forfeiture of a charter cannot be considered in a collateral proceeding. Even when the terms of a charter are that the corporation shall be dissolved on the non-performance of a condition, the mere failure to perform, it is not *ipso facto* a dissolution, but a judgment of ouster is necessary. In the absence of a statute enabling a private party to take advantage of a forfeiture of a charter, only the state can do it. It is for the state to decide whether the forfeiture shall be enforced or not. An individual cannot assert it until it has been enforced through a proceeding on behalf of the state for that purpose. A private party is estopped from taking advantage of a forfeiture, resulting from irregularities from the charter in the organization of the company, and courts are bound to regard it as a corporation so far as third persons are concerned until it is dissolved by judicial proceedings. The question whether it has or has not, cannot be raised or examined collaterally, or in another than a direct proceeding to obtain a decree of forfeiture. And a defendant in an action brought by a corporation is not allowed to set up in his defence the charge of irregularities, neglect, abuse, &c., which warrant a forfeiture of the charter or corporate powers. And until a forfeiture has been judicially declared a corporation cannot be estopped from prosecuting its rights of action against its members. This rule applies in cases where actions are brought to recover subscriptions or assessments on the capital stock, in actions brought to recover debts due from individuals, and to foreclose mortgages given to building asso-

¹ Tioga R. R. Co., 3 Keyes, 354.

² People v. Central R. R. Co. N. T., 48 Barb. 478.

ciations. And no stockholder can avail himself of such an objection on a suit brought against him by a corporation, nor can it be impeached for fraud.

SEC. 570. A corporation cannot be organized nor act without the limits of the jurisdiction creating it. All votes and proceedings of persons professing to act in the capacity of corporators, when assembled beyond the bounds of the state granting the charter, are void, but a subscriber to stock of a corporation thus illegally organized, who has given his note for the amount subscribed, is, by his acts, estopped from denying the legal existence of the corporation, when sued by a *bona fide* endorsee for value before maturity.¹ And where a party holding stock transfers it, thus recognizing its validity, it estops him, on a suit for the original subscription, from setting up that it is invalid by reason of the non-payment of the sums necessary to give it validity, at the time of making the subscription.² A subscriber to stock in a corporation, who attends a meeting of the stockholders and votes on the business of the company, is estopped from denying the validity of his subscription.³ So if he has paid instalments of assessments, he cannot deny its legal existence, in an action against him for the balance of his assessment, or in a collateral way question the regularity of its organization. In the absence of fraud, any one subscribing to stock in a corporation, is estopped to deny its existence.⁴ If a party admits that he is a subscriber to stock in a corporation, and on the faith of such admission others have acted for his benefit, he will be estopped from denying that he did in fact subscribe.⁵ A subscriber to stock in a corporation, who accepted the charter, has taken part in the business of the company, attended its meetings, and acted in the position of director, is estopped from setting up fraud in the procuring of the subscriptions of stock,

¹ Camp v. Byrne, 41 Mo. 525; E. P. Hotel Co. v. West, 13 La. 345.

² Everhart v. W. & P. R. R. Co. 28 Penn. St. 339.

³ E. & W. P. R. R. Co. v. Brown, 25 Penn. St. 136; Lexington, &c. R. R. Co. v. Chandler, 13 Met. 311.

⁴ Sups v. Greensburgh Plank Road Co. 10 Ind. 46; Fort Wayne T. Co. v. Deams, id. 563.

⁵ Graff v. P. & S. R. R. 31 Penn. 489.

when garnisheed as a subscriber in an action against the corporation.¹

SEC. 571. A subscriber to stock in a corporation admits the legal existence of it, and cannot question their capacity to appear on the record.² A stockholder who has acted as director, or a party who has contracted a debt to a corporation, is estopped from setting up as a defense an irregularity which might show that the corporation never existed, or that it had incurred a forfeiture. So one who has openly avowed himself a stockholder, is a registered member, and as such has taken part in its management, cannot be allowed as against third persons to prove that the corporation was never lawfully created. But this rule that a party contracting with a corporation as such is estopped from denying its corporate existence at the time of the contract does not apply to a suit brought on a subscription made with a view to the organization of a corporation. In an action by a corporation to recover a sum of money loaned to the defendant, the latter having had the benefit of the contract of loan, cannot be permitted to avail himself of the defence that the corporation plaintiff had no *authority*, express or implied, by the terms of its charter, to make the loan.³ When it is a simple question of capacity to contract, arising either on a question of regularity of organization, or of powers conferred by the charter, a party who has had the benefit of the contract is estopped from questioning its validity. So one who contracts with a corporation acting under an amended charter cannot complain that the amendment has not been properly accepted by the corporation.⁴ Where one contracts with what purports to be a corporation, he is estopped from denying its existence at the date of the contract,⁵ and if he relies upon a subsequent dissolution he must allege and prove how it ceased to exist.⁶ Contracting with a corpora-

¹ Smith v. Heidenecker, 39 Mo. 157.

² Dutchess Cotton Mfg. v. Davis, 14 John, 238; O. & S. Plank R. Co. v. Rust, 5 How. Pr. 390.

³ Williams v. F. T. A. Ass. 26 Ind. 310.

⁴ Eppes v. M. R. R. Co. 35 Ala. 33.

⁵ McBroom v. Lebanon Co., 31 Ind. 268; Cochran v. Arnold, 58 Penn. St. 349

⁶ B. & G. Turnpike Co. v. McCarty, 8 Ind. 392.

tion in its corporate name, addressing petitions to its directors, and acting on a committee to report by-laws, is an admission of incorporation.¹

SEC. 572. Where a party whose name appears signed to an instrument, performs acts which are required by it, that will be regarded as such a recognition of its validity as will estop him from denying its legality. So where a person's name appears to a subscription stock of a banking association, and he has paid calls as a shareholder on the number of shares set opposite his name after his name was placed there, this will be taken as an admission that his subscription was authorized and is binding.² Where a party subscribes to stock in a bank or other corporation, and gives a bond and mortgage for the amount of his subscription, with intent that it should be assigned to a state officer as security for notes issued by the bank, and the bond and mortgage is so assigned and notes issued on the security of them, on a suit by the assignee of the mortgage, the subscriber is estopped from setting up that the mortgage was obtained by fraud, and if the mortgagor had personally given the mortgage to the officer who issued the bills or notes as valid security, he cannot afterwards set up that the security is invalid.³ Where a bank charter required, that a certain proportion of its capital should be paid in in specie, and a certificate thereof, under oath, before it should proceed to issue bills; the president rendered such a certificate, knowing it to be untrue, (in consequence of which the bank was illegally organized), and afterwards transferred his stock; his administrators were estopped from recovering of the stockholders upon the bills of which he died possessed.⁴ A person who receives funds of a bank and transacts business with it, cannot afterwards, in an action by the receivers, deny the legality of its organization.⁵ So a debtor to a bank cannot collaterally, in a suit on the debt, avail himself of fraud in

¹ *South Bay Meadow Dam Co. v. Gray*, 30 Me. 547.

² *Boggs et al. v. Oleott*, 40 Ill. 303.

³ *Hubbard v. Briggs*, 31 N. Y. 518.

⁴ *McDongal v. Bellows*, 18 Geo. 411.

⁵ *Receivers of Circleville Bank v. Renick*, 15 Ohio, 322.

the organization of the bank, to defeat their charter, they having always acted as if well organized.¹ After a banking association has repudiated for years all the arrangements made with one who subscribed for shares, (and denied him the rights of a stockholder), the associates, by their receiver, who represents them, cannot be permitted to come in and claim him as a stockholder or partner.² After a bank is insolvent, its debtor cannot purchase notes for which it was liable, to set off against his debt.³ In an action by a bank on a bond which recited that A. is cashier, the bondsmen are estopped from denying that A. was properly appointed and qualified as such cashier.⁴

SEC. 573. A defect in the proceedings to organize a corporation is no defense to a stockholder sued to enforce his individual liability, who has participated in its acts of user, as a corporation *de facto*, and appeared as a shareholder upon its books, when the debt for which he is sued was contracted.⁵ Where a charter gives to individuals a corporate capacity upon the performance of certain acts, a person contracting with these individuals by their corporate names is estopped from denying the performance of those acts, which gave them a corporate existence.⁶ So one who has received property from a corporation by way of mortgage, and has sold it under the power contained in the mortgage, cannot refuse to credit it with the proceeds, on the ground that its dealings with him were *ultra vires*. Neither a stockholder who has acted as a director, nor a party incurring a debt to a company, can set up as a defense an irregularity which might show that a corporation never existed, or that it had incurred a forfeiture. Upon the same principle one who has openly avowed himself a stockholder of the company, has taken part in its management, cannot be allowed as against third persons, to allege that the corporation was never lawfully created. Such allegations are only

¹ Bank of Georgia v. Williams, 25 Geo. 594.

² Burrows v. Smith, 10 N. Y. 550.

³ Thorpe v. Wedgeforth, 56 Penn. 82.

⁴ Bank of Elizabeth v. Chetwood. 3 Halsted, 1.

⁵ Eaton v. Aspinwall, 19 N. Y. 119; Eaton v. Smith, 19 N. Y. 119.

⁶ Hamtrack v. Bank of Edwardville, 2 Mo. 169.

available on behalf of that sovereign power of the state.¹ One who accepts or receives a transfer of stock on receipt of such transfer, places himself in the same relation to the company as the original subscriber occupied, and is estopped from disputing the validity of a debt upon any ground that could not have been taken by the subscriber.² One who has taken and relies on a conveyance of land from a company which has assumed in giving it, to act as a corporation, cannot deny the legal existence of the corporation, in an action against him to recover possession of the land, by another person who has attached the same in an action against the company as a corporation prior to the recording of the deed, and has subsequently levied his execution thereon.³ An irregularity in the organization of a corporation cannot be taken advantage of by one dealing with the company.⁴ So one who was active in the organization of a corporation, being an original member and having induced others to become members, and to deal with it as a corporation, and has borrowed money from it, and has given his obligation payable to it therefor, cannot evade the enforcement of such obligation by an objection to the validity of the original organization; he is bound by an equitable estoppel.

SEC. 574. If the charter of a corporation requires a particular officer to be a resident of the state in which it is located, one who has accepted and exercised that office cannot, when sued by its creditors, be heard to deny the character in which he held himself out to the world, nor allege that he was not qualified to hold that office by his residence in the state.⁵ Inducing one to act as an officer, or a party who has concurred in inducing one to act, is estopped from making an application in the nature of a *quo warranto* to eject him from the office.⁶ So where a party accepts an office from persons who are acting as a corporation, and serves as such officer for several years, and in his

¹ Sands v. Hill, 42 Barb. 691.

² Palmer v. Lawrence, 3 Sand. 161.

³ Tooley v. Wolcott, 4 Allen. 406.

⁴ Frost v. Frostburg Coal Co., 24 Howard, 278.

⁵ Bank of St. Mary's v. St. John, 25 Ala. 556.

⁶ Regina v. Greene, 2 Q. B. 460.

official capacity receives money, for which an action to recover it is brought against him, he is estopped to deny the corporate existence of the plaintiff.¹ A corporator who, with the full knowledge of the objections to the legality of a certain class of votes, attends a meeting, participates in its deliberations and acquiesces in its decisions by canvassing and voting in the election of officers, is estopped from questioning the title of the officers elected, on the ground that such class of votes was illegal.² It is a bar to the application of the relator for a *quo warranto* that he was present and concurred at the time of the objectionable election, notwithstanding at that time he was ignorant of the objection, for a corporator must be presumed to know the contents of his own charter and of the law applying thereto.³ Where a party has paid in his stock, accepted a directorship in an association and advised and consulted with the other directors in reference to the business of the association, he thereby admits that he was a member, and such acts are sufficient to render him liable for the debts of the concern.⁴

SEC. 575. A defendant who has contracted with a corporation *de facto*, is never permitted to allege any defect in the organization, as affecting its capacity to contract or sue. It would be in the highest degree inequitable and unjust to permit him to rescind a contract, the fruits of which he retains, and can never be compelled to restore.⁵ So, where a stockholder of a company was sued on a note after the dissolution of the company, he cannot set up that it was never legally incorporated, for the reason that by becoming and continuing a stockholder he recognizes a corporate existence.⁶ It is no defence to an action of foreclosure brought by a building association against the mortgagor that the association had forfeited its charter. It belongs to the state alone by a proceeding instituted for that purpose to enforce the forfeiture, and a corporation until by a judicial

¹ All Saints Church v. Lovett, 1 Hall, N. Y. 191.

² State v. Lepre, 7 Rich. (S. C.) 264.

³ Rex v. Trevenen, 2 B. & A., 339.

⁴ Stone v. G. Wire Co., 41 Ill., 87; Boggs v. Olecott, 40 Ill., 303.

⁵ Palmer v. Lawrence, 3 Sand., 161; Steam Nav. Co. v. Weed, 17 Barb., 378.

⁶ Mead v. Keeler. 21 Barb., 20.

sentence its charter be declared void, is a corporation *de facto*, and no person dealing with it can be allowed to say that it was not a corporation *de facto*.¹ A stockholder of a corporation, who joined in an application made to the court by a receiver, for authority to sell the assets of the corporation, will be estopped from questioning the regularity of the receiver's appointment, or of the order directing the sale.²

SEC. 576. After a corporation has been established according to the provisions the statute, upon proper evidence its validity cannot be questioned, or its legal existence denied by any of its members.³

SEC. 577. An agent who collects money in the name of persons acting as trustees of an unincorporated society, on a bill which he received from them for collection, or takes payment of such bill, is bound to account to such persons for the money received by him, and in a suit by them to recover the same, he is estopped from denying their legal or beneficial interest in the money due, or their right to sue in their own names.⁴ So, where a person or member of a company, having done and consented that the company should do numerous acts, implying that it was a corporation, he is equitably estopped from denying that it is a corporation.⁵ A person who has been admitted as a member of a corporate body and has acted as such, is estopped in an action for infringing by-laws from showing that the charter was not accepted by a majority of the grantees.⁶ Where parties contract with a corporation knowing that its certificate is fraudulent or erroneous, they cannot allege that they were injured.

SEC. 578. An agreement between A. & B. whereby B. is induced to take A.'s stock upon a guarantee of dividends

¹ Meech. Building Ass. v. Stevens, 5 Duer, 676.

² Buttershall v. Davis, 31 Barb., 323.

³ Cooper v. Shaver, 41 Barb., 151.

⁴ Day v. Southwell, 3 Wis., 657.

⁵ West Winsted Bank, &c., v. Ford, 27 Conn., 282; Howard Mut. Loan Ass. v. McIntyre, 3 Allen, 571.

⁶ Tobacco Pipe Works Co. v. Woodruff, 7 Barn. & C., 838.

estops B. from denying his membership and liability.¹ A buyer of shares who has made false representations to the company to induce them to enter his name upon the register of shares is estopped to deny the validity of the transfer so obtained, in an action against him for calls.² So where a party represents himself to be the owner of shares and sent in scrip certificates which had been purchased by him claiming to be registered as proprietor in respect thereof, and had received from the company receipts therefor with a notice that they would be exchanged for sealed certificates on demand, he was estopped to deny his liability for calls, although his name had not been entered on the register or any transfer entered as required by law.³ So payments of instalments on subscription to its stock is a sufficient recognition of its existence and organization, to enable it to recover unpaid instalments from a stockholder.⁴ But a subscriber who has paid an illegal assessment is not thereby estopped from setting up illegality, as a defense to a suit for a second one.⁵ But a party appointed to receive subscriptions, subscribes himself, and then obtains a charter on the ground that the subscriptions were taken in good faith, is estopped in an action against him for assessments, from showing that his subscription was made on a condition not complied with.⁶ So a subscriber will be estopped from denying the legality of the assessments, on the ground that all the shares are not taken,⁷ and where a party has paid calls on shares, or attended meetings of the company as the owner of shares, thus estops him from denying membership.⁸ Testimony tending to show that a company is a corporation *de facto* dispenses with strict proof and estops the party offering it from afterwards

1 Dewsbury & N. R. R. Co. v. Wilson, 22 Conn. 435.

2 Sheffield R. W. Co. v. Woodcock, 2 M. & W. 574; London G. J. R. W. Co. v. Freeman, 2 Eng. Railway cases, 522.

3 Cheltenham R. W. Co. v. Daniel, 2 Eng. R. W. cases 728; Cheltenham R. W. Co. v. DeMedina, 2 Eng. R. W. cases, 735.

4 Maltby v. N. W. R. R. 16 Md. 422.

5 Somerset R. R. v. Cushing. 45 Me. 324.

6 Balvington v. Penn. R. R. Co. 34 Penn. 358.

7 N. H. Central R. R. v. Johnson, 30 N. H. 490.

8 Crawford v. Lacey, 3 Young & C. 80; London & C. R. W. Co. v. Graham, 2 E. R. C. 870.

disputing the company's right to act as a corporation. Where a party defendant pleads the general issue, it is an admission of their corporate capacity, and estops any proof to the contrary.¹

SEC. 579. A deed to a company describing them as a corporation, before in fact any act of incorporation has been passed, estops the grantor from claiming title against them upon their becoming incorporated; it enures by way of estoppel, against the grantor.² Where a mortgage or other instrument is given to a corporation, it admits the corporate existence of the mortgagee, &c., and no further proof is necessary. So, giving a note is an admission of its existence, and estops the maker from denying that there is such a corporation,³ and estops the maker from alleging that the charter was forfeited before the note was made.⁴

SEC. 580. Endorsing a note to a bank does not admit that they are a corporation. To give it such an effect would be to make them, for judicial purposes, a corporation, though they had no existence in fact.⁵ A party is estopped from setting up that a foreign corporation cannot, by its charter, make a loan, when he is sued for a loan made to him.⁶ Where a charter of a corporation is judicially declared to be forfeited, and a trustee is appointed to take charge of its assets, on a bill filed for the distribution of the assets, the trustee is estopped to deny the title of the stockholders to such distribution.⁷ An individual stockholder cannot maintain a suit against the directors of a corporation for mismanaging its affairs, for the purpose of defrauding the corporation,⁸ nor can he object to a transfer of all its property to another corporation, where it is done

¹ Roundell v. Fay, 32 Cal. 354.

² Bryer v. Rich, 1 Met. 180.

³ Franklin v. Twoogood, 13 Iowa, 515; Cong. Society v. Perry, 6 N. H. 164; Jones v. Bank of Tenn., 8 B. Mon. 122; Montg. R. R. v. Hurst, 9 Ala. S. 513; John v. F. & M. Bank, 2 Blackf. 357.

⁴ Bank of Gall, v. Trimble, 6 B. Mon. 599.

⁵ Hargrave v. Bank of Ill., 1 Ill. (Breeze) 84.

⁶ Steam Nav. Co. v. Weed, 17 Barb. 378.

⁷ Bacon v. Robertson, 18 How. 480.

⁸ Allen v. Curtis, 26 Conn. 466.

under a law passed by a state legislature, nor can he, by injunction, restrain the transfer or sale.¹ A stockholder, standing silently by, and seeing an illegal act performed, cannot hold the directors responsible for such act. His acquiescence in it estops him.²

¹ *Lauman v. L. R. R.*, 31 Penn. St. 42.

² *Hodges v. N. E. Screw Co.*, 3 R. I. 9; *Graham v. Burkhead R. R. Co.*, 6 Eng. L. & Eq. 132.

CHAPTER XX.

HOW AN ESTOPPEL IS TO BE MADE AVAILABLE, PLEADING AN ESTOPPEL WAIVING IT, ETC., ETC.

SECTION 581. Having shown what an estoppel is, how it is created, and its operation and application to parties, privies, titles to real estate, commercial jurisprudence, corporations, &c., it is proper now to show in what manner the estoppel, where it exists, is to be made available. There has been quite a diversity of opinion in regard to this question, and in the old English authorities, commencing with L. Coke's reports to the present time, there has been a variety of decisions, and it has been the prevailing opinion that in order to make a judgment conclusive by way of an estoppel, that it must be pleaded as such. In the celebrated case of the Duchess of Kingston,¹ the law was laid down that a judgment between the same parties on the same point is in pleading a bar, in evidence conclusive; and the law seems to be well settled, that where there is an opportunity of pleading it, it is conclusive as a plea, but where there is no such opportunity it is conclusive as evidence.²

SEC. 582. While it is also a rule that a party neglecting to plead an estoppel cannot take advantage of it, if denied the opportunity to plead it, he may give it in evidence under the general issue. Thus where A. brought trespass *quare clausum* against B., to which B. pleaded title in C., under whom he claimed without showing how C.'s title was derived, or when it accrued, it was held that A. might give in evidence an award against the title of C. without pleading it.³ If no

¹ 20 How. State trials.

² Howard v. Mitchell, 14 Mass. 241; McNair v. O'Fallon, 8 Miss. ; Shelton v. Alcox, 11 Conn. 240; Isaacs v. Clark, 12 Vt. 692; Woodhouse v. Williams, 3 Dev. 508.

³ Shelton v. Alcox, 11 Conn. 240.

objection is taken when the estoppel by record is offered in evidence, that it was not specially pleaded, no objection can be afterwards made to that pleading. A party is bound to abide by his pleadings, and is estopped from proving anything in opposition thereto. A party is not allowed to state one case in a bill or answer and make out a different one by proof. The *allegata* and *probata* must agree; where the case is such that the plaintiff cannot plead an estoppel, it is conclusive as evidence. A judgment to constitute an estoppel must show that the subject matter has been passed on and adjudicated.¹ There can be no averment in pleading against the validity of a judgment, though there may be against its operation.²

SEC. 583. The court or jury are equally bound by an estoppel, whether it be pleaded or given in evidence.³ Lord Coke, in one of the earlier cases, decided that a jury were not bound by an estoppel, because they had taken an oath to decide according to the truth, but this was in the case of an estoppel by deed. But this is denied in its application to judgments recovered, for the obvious reasons, first, that juries are not sworn to say the truth, but to give a true verdict according to the evidence. An estoppel precludes the party estopped from offering any evidence to the contrary. And it is difficult to see in what manner the oath of a juror can be opposed to the rule, that a record shall prevent the party against whom it is offered in evidence from producing other evidence to controvert it, and that all the evidence being thus one way, namely, *with the record*, the jury shall be *bound* to give their verdict for the party with whom all the evidence is, and against the party in whose favor there is no evidence. Second, the estoppel by deed is allowed for the benefit of the party, which he is at liberty to waive, but in the case of an estoppel by judgment, the whole community have an interest in holding the parties conclusively bound

¹ Clemens v. Murphy, 40 Mo. 121; Wight v. Walbaum, 39 Ill. 555; Ridgley v. Stillwell, 27 Mo. 128; Biddle v. Wilkins, 1 Peters, 686; French v. Lafayette Ins. Co. 5 McLean, 466.

² Flandrau v. Downey, 23 Cal. 554; Philadelphia, &c. R. R. v. Howard, 13 How. 308.

³ Philadelphia, W. & B. R. R. v. Howard, 13 Howard, 308.

by their own litigation. *Interest rei publicae res judicatae non rescindi*. If the law of estoppel is founded on justice and good sense, if it be true that *nemo debet bis vexari pro eadem causa*, it would indeed be strange if the accidental form of an issue deprived a party of the benefit of it, and force him to litigate the same question twice over. It appears inconsistent that the authority of a *res judicata* should govern the court, when the matter is referred to them by pleading, but that a jury should be at liberty altogether to disregard it, when the matter is referred to them in evidence, and that the operation of so important a principle should be left to depend upon the technical forms of pleading in particular actions.¹

SEC. 584. It has never, with one or two exceptions, been held, that where a decree in chancery or judgment of an inferior court, or any other matter *quasi* of record, is conclusive, any necessity exists of pleading it, in order that it may be held so. The obligation of a jury to find a true verdict is equally as great whether the matter offered as conclusive, be a decree, or a judgment. The same rule prevails in regard to awards, which is applicable to judgments, while the *forum* of an arbitrator is a domestic one, constituted by the parties themselves. They are as much bound by it as by a judgment of a court of record, and, therefore, the same rule is applicable in regard to pleading them or giving them in evidence. It has, therefore, become a well established principle of law in the majority of the American states, as well as in England, that a former recovery, when given in evidence, is equally conclusive in its effect, as if it were specially pleaded by way of estoppel.²

SEC. 585. The estoppel of a judgment only binds parties and privies, and does not extend to those who are strangers in person and estate, except in those cases where the suit in which the judgment is rendered partakes of the nature of a proceeding *in rem*. A recovery against a vendee in possession will not bind a vendor, so a judgment for or against a garnishee in an attachment issued by one creditor,

¹ Doe v. Wright, 10 A. & E. 763.

² Marsh v. Pier, 4 Rawle, 288.

cannot be pleaded as an estoppel to a subsequent attachment by another creditor of the defendant in attachment for the same debt, because the parties are different, and there is no such privity as to bring the second proceeding within the estoppel of the first. So a judgment against one co-partner, co-contractor, co-obligor will not be conclusive in a subsequent action in which another joined because it would be unjust to bind him by the result of a proceeding where he had no opportunity of cross-examining the witnesses or making a defence.

SEC. 586. A judgment in one action to be an estoppel in another, it must be averred, and when not apparent it must be proved to have been rendered on the merits, as well as for the same cause of action.¹ A plea may be good which shows this with substantial accuracy without being certain in every particular,² and it will be enough to set forth a prior recovery between the same parties, for the recovery of the same property, without averring that the recovery was for the same conversion. That the former decision was on technical grounds, and did not touch the merits of the controversy, will be immaterial unless the proceeding was one in which they could not be heard or determined; a party who fails to sustain his case by the proper evidence and allegations, must submit to the consequence of his negligence, and cannot have relief in another suit.³ The same result will follow when the failure to make a good defence arises from a mistaken impression that the matter will remain open and may be the foundation of a subsequent suit. So a judgment rendered on a question of law, when the facts are admitted by demurrer, or case stated, will estop a renewal of the controversy on the same ground.⁴ The correcting of a judgment cannot be impeached on the ground that the law was mistaken by the court, or the facts wrongly found by the jury, because the proper remedy is, by bill of exceptions or motion for a new trial, and any injury which results from a

¹ Greely v. Smith, 3 W. & M., 236; Johnson v. White, 13 S. & M., 584

² Shields v. Taylor, 13 S. & M., 124.

³ Gray v. Gillillan, 15 Ill. 454.

⁴ Perkins v. Moore, Vallandigham v. Ryan, Robinson v. Howard.

failure to it must be imputed to the laches of the injured party, and not to the tribunal which decided against him.¹

SEC. 587. Although a judgment recovered, if for the same cause of action, and between parties substantially the same, will be admissible in evidence, yet, in order to render it *conclusive* as an estoppel, it should, if the opportunity presents itself, be so pleaded.² The proper requisites to a plea of judgment recovered are thus specified by Vinnius, lib. 4, tit. 13, § 5 : *Hæc autem exceptio (rei judicatæ) non aliter genti obstat quam si eadem quæstio inter easdem personas revocetur; itaque ita demum nocet si omnia sint eadem, idem corpus, eadem quantitas, idemjux, eadem causa petendi, eademque conditio personarum.*³ A judgment recovered will be admissible as evidence, not only between the same parties, if suing in the same right,⁴ but likewise between their privies, whether in blood, law, or estate;⁵ and a judgment will be evidence between those who, although not nominally, are really and substantially the same parties.⁶ If there be a breach of contract or wrong done, or any other cause of action, by one against another, and judgment be recovered in a court of record, the judgment is a bar to the original cause of action, because it is thereby reduced to a certainty, and the object of the suit attained so far as it can be at that stage, and it would be useless and vexatious to subject the defendant to another suit for the purpose of obtaining the same result. Hence the legal maxim, *Transit in rem judicatum*, the cause of the action is changed into matter of record which is of a higher nature, and the inferior remedy is merged into the higher. This appears to be equally true where there is but one cause of action, whether it be against a single person or many. The judgment of a court of re-

¹ Kelly v. Pike, 5 Cush., 384; Marsh v. Pier, 4 Rawle; Mervine v. Parker, 18 Ala. 241.

² Doe v. Huddart, 2 Cr. M. & R. 316; Stroder v. Seaton, Id. 731; Doe v. Wright, 10 A. & E. 763.

³ Ricardo v. Garcias, 12 Cl. & Fin. 368; Nelson v. Couch, 15 C. B. N. S. 99.

⁴ Outram v. Morewood, 3 East, 346; Com. Dig. Estoppel, (C.)

⁵ Trevivan v. Lawrence, 1 Salk. 276.

⁶ Kinnersley v. Orpe, 2 Doug. 517; Simpson v. Pickering, 1 Cr. M. & R. 529; Struot v. Bovingdon, 5 Ep. 56; Hancock v. Welsh, 1 Stark, N. P. C. 347.

cord changes the nature of that cause of action, and prevents its being the subject of another suit, and the cause of action being single, cannot afterwards be divided into two.

SEC. 588. A judgment recovered will be evidence whenever the cause of action is the same,¹ although the form of the second action be different from that of the first;² and the record, when produced, must be such as to show on its face that the cause of action in the second case may be the same as that for which the judgment was recovered in the former action.³ A recovery in trover will vest the property in the chattel sued for in the defendant, and will be a bar to an action for trespass in the taking;⁴ and "If two jointly convert goods, and one of them receive the proceeds, you cannot, after a recovery against one in trover, have an action against the other for the same conversion, or an action for money had and received to cover the value of the goods, for which a judgment has already passed in the former action."⁵

SEC. 589. If, however, it be doubtful whether the second action is brought *pro eadem causa*, it is a proper test to consider whether the same evidence would sustain both actions,⁶ and what was the particular point or matter determined in the former action; for a judgment in each species of action is final only for its own purpose and object, and *quoad* the subject matter adjudicated upon, and no further; for instance, a judgment for the plaintiff in trespass affirms a right of possession to be, as between the plaintiff and defendant, in the plaintiff at the time of the trespass committed, but, in a subsequent ejectment between the same parties, would not be conclusive with respect to the general right of property in the *locus in quo*. Where, in an action

1 Williams v. Thacher, 1 B. & B., 514; Hopkins v. Freeman, 13 M. & W., 372; Guest v. Warren, 9 Exch. 379; Durekle v. Wiles, 5 Denio, R. 303; Felter v. Beal, 1 Lord Raym. 339.

2 Foster v. Allanson, 2 T. R. 483; Pease v. Chaytor 32 L. G. M. C. 121.

3 Wadsworth v. Bentley, 23 Q. B. H. B. 3; Ricardo v. Garcias, 12 Cl. & G. 369.

4 Smith v. Gibson, Hardw. 319; Buckland v. Johnson, 15 C. B. 145; Moor v. Watts, Lord Raym. 614.

5 Cooper v. Shepherd, 3 C. B. 266; Adams v. Boughton, Andr. 18.

6 Hadley v. Green, 2 Tyrw. 390; Wiat v. Essington, 2 Lord Raym. 1410; Clegg v. Dearden, 12 Q. B. 576; Hunter v. Stewart, 31 L. J. Chanc. 346.

for the stipulated price for a specific chattel, the defendant pleaded payment into court of a sum, which the plaintiffs took out in satisfaction of the cause of action, it was held that the defendant in that action was not thereby estopped from suing the plaintiffs for negligence in the construction of the chattel.¹ Not only are the facts actually decided by an issue in any suit, but cannot be again litigated between the same parties, and are evidence between them, and that conclusive, for the purpose of terminating litigation; but so likewise are the material facts alleged by one party, which are directly admitted by the opposite party, or indirectly admitted by taking a traverse on some other facts, provided that the traverse thus taken be found against the party making it.²

SEC. 590. It has been held that a former judgment, upon the same cause of action, was inadmissible, under the general issue in trespass or assumpsit.³ This is still true in regard to actions founded on a tort or trespass.⁴ But in this country a former judgment is conclusive between the same parties in any of the forms of case or ejectment, without pleading it,⁵ although it will not be conclusive unless the circumstances are such that it could not have been pleaded.⁶ An estoppel will therefore be conclusive in evidence whenever there has been no opportunity to take advantage of it in pleading.⁷

SEC. 591. And in those States where special pleading has been abolished, by usage or statute, estoppels are conclusive in evidence, although not pleaded.⁸ There is this distinction between case and trespass that while an estoppel in one must be pleaded, it is conclusive in evidence under the

¹ *Riggs v. Burbidge*, 15 M. & W. 598; *Mondel v. Steele*, 8 M. & W. 858.

² *Boilean v. Rutlin*, 2 Exch. 663; *Buckmaster v. Meiklejohn*, 8 Exch. 687; *Carter v. James*, 13 M. & W. 137; *Hutt v. Morrell*, 3 Exch. 241.

³ *Young v. Raincock*, 7 C. B. 310; *Seymour's Case*, 10 Coke, 970; *Gilbert v. Thompson*, 9 Cush. 318.

⁴ *Fowler v. Hill*, 10 Johns. 111; *Coles v. Carter*, 9 Cowen, 691; *Brown v. Wilder*, 12 Johns. 455.

⁵ *Gilchrist v. Ball*, 8 Watts, 255; *Young v. Rummell*, 2 Hill, 478.

⁶ *Young v. Black*, 5 Cranch, 565.

⁷ *Sprague v. Waite*, 19 Pick. 457.

⁸ *Whitney v. Clarendon*, 18 V. 252.

general issue in the other.¹ A former recovery for the same cause of action is an absolute bar under a general plea of non-assumpsit; while it has been held² that there is no difference between the effect of a judgment, when pleaded and when given in evidence, in those actions, like trespass on the case or trespass for mesne profits, which are the creatures of the law, and therefore less subject to strict or technical rules of pleading. It has been held that the doctrine that actions on the case or trover afforded an exception to the general rule, requiring a former judgment to be pleaded was unsound, and could not be reconciled with the English decisions. A distinction founded merely upon the form of action, is too narrow and technical to rule a point which should be governed by general and liberal principles of policy and convenience; and if the defendant can rely on a former judgment as a bar without pleading it in any case, he should have the same privilege in all. And accordingly a defendant was permitted to give a judgment in his favor in evidence under a traverse of the plaintiff's title in replevin, with the same effect as if it had been pleaded.³ In New York and in some other states, under the code system, a former judgment, must, in common with all other defences, be set forth specially in pleading.⁴

SEC. 592. When the estoppel already appears from the pleadings on either side, it need not be set out again, formerly of record, and the proper course is to demur without going further. So, where a plaintiff declared on an instrument that contained a recital, that the defendant possessed certain shares of stock, and defendant craved oyer, and then denied possession of the stock by plea, it was held that the estoppel was apparent on the face of the record, and might be taken advantage of at once by demurrer, without replication.⁵ Estoppel against an estoppel will set the matter at large, so, when an issue found for the plaintiff in one action

¹ *Man v. Drexell*, 2 Penn. St. 202.

² *Miller v. Manice*, 6 Hill, 114.

³ *Marsh v. Pier*, 4 Rawle, 279.

⁴ *Beel v. Pierce*, 13 Ind. 550.

⁵ *Beckett v. Bradley*, 7 M. & G. 994; *Miller v. Elliott*, 1 Carter, 484.

is found against him in another, neither will be conclusive, and the question will then remain open for decision. But to produce this result, it must appear affirmatively, and not by mere argument or inference, that both adjudications were identical, or turned on the same point.¹

SEC. 593. Judgments and decrees, as estoppels, conclude parties and privies only. The grounds on which persons standing in the relation of *privity* to the litigating party are bound by the proceedings to which he was a party, is, that they are identified with him in interest; and when this identity is found to exist, all alike are concluded. When, therefore, one binds and obliges that the defendant in an attachment would cause the property levied upon and replevied by the said bond to be forthcoming, to abide the final order of the court in the said suit, he connected himself in *privity* with the proceedings therein, and made the record of the judgment conclusive evidence against him. Whenever the matter of the estoppel is apparent on the face of the record advantage may be taken thereof by demurrer.² In an action on a bond, if the record in the suit on the bond shows that a recovery was had for damages, the record cannot be controverted, and a pleading in another action which attempts to controvert it is bad on demurrer.³ If to a plea of former recovery the plaintiff reply that the cause of action are not the same, it was held that the issue was for a jury.⁴ A party who has been unsuccessful in pleading an estoppel is not afterwards precluded from confessing and avoiding or traversing the allegation of his adversary.⁵

SEC. 594. In an action for trespass for breaking and entering a warehouse, and taking therefrom certain goods, the defendants pleaded that they took the goods by virtue of legal process, as the property of a third person, and that they broke into the warehouse because they were refused admittance upon demand. The plaintiffs replied that the goods

¹ Messerau v. Pearsall, 19 N. Y. 108.

² Collins v. Mitchell, 5 Fla. 364; Trimble v. Scott, 4 Blackford.

³ Sheppard v. Butterfield, 41 Ill. 77.

⁴ James v. Lawrenceburg Ins. Co., 6 Blackfd. 525.

⁵ Dana v. Bryant, 6 Ill. 104.

were the property of A., and not of the debtor, as whose they were when taken and that they had received the goods to keep for A. The defendants rejoined, in estoppel, that A. had brought an action of trespass against them for taking and carrying away the same goods, and that issue had been joined in that action upon the question of A.'s title to the goods, and that judgment had been rendered thereon in favor of the defendants. Held, on demurrer to this rejoinder, that the matter was well pleaded as an estoppel, and that the defendants were entitled to judgment.¹ A party cannot be estopped from pleading the general issue, nor is a party estopped from maintaining an action, although it be in violation of an executory agreement.²

SEC. 595. A recovery in suit upon an agreement, wherein the right to recover depended, by the pleadings, upon the truth of the allegation made in the complaint, and denied by the answer, that the plaintiff had fully performed the agreement, was a bar to an action brought subsequently by the defendant in the first writ against the defendant thereon, to recover damages for the alleged non-performance of the same agreement.

SEC. 596. The record of the recovery estops the defendant from controverting that the plaintiff fully performed the contract.³ After joinder of an issue of fraud in obtaining a discharge, an estoppel cannot be taken advantage of against the party pleading the fraud ; it must be pleaded.⁴ A party is not estopped from proving a just defence, because his evidence tends to prove him guilty of fraud in relation to a matter on which his defense does not rest.⁵ When the fact which concludes the defendant from making the denial appears in the declaration, the estoppel may be insisted on by a demurrer to the plea, by which the same matter is set up as a defence.⁶ It is held in Indiana that in order to render a former recovery an estoppel to a subsequent suit, em-

¹ *Burton v. Wilkinson*, 18 Vt. 186.

² *Gibson v. Gibson*, 13 Mass. 106.

³ *Davis v. Talcott*, 12 N. Y. 184.

⁴ *Sawyer v. Hoyt*, 2 Tyler, Vt. 288.

⁵ *Wood v. Kirk*, 28 N. H. 324.

⁶ *Smith v. Whittaker*, 11 Ill. 417.

bracing the same matter in controversy with the first, the judgment must be specially pleaded as an estoppel.¹ Where a former recovery and judgment is set up by way of estoppel, it must be on a precise point distinctly in issue.²

SEC. 597. A party who is in laches cannot complain of the neglect or delay of his adversary arising from that laches.³ Where evidence is offered of facts which the party is estopped from proving, and no objection is made, the estoppel is waived.⁴ If a party, instead of taking advantage of an estoppel by demurrer or plea, takes issue on the matter of the estoppel, the estoppel is waived.⁵ In an action of *assumpsit* on a charter-party made between the defendant, described in the declaration as the owner of the ship, and S., the plaintiff, merchant and freighter, for not taking the cargo on board, the plea was *non-assumpsit*. The charter-party stated that it was made by the plaintiff, as agent for the freighter, and concluded thus: "This charter-party being concluded on behalf of another party, it is agreed that all responsibility on the part of S. & Co., ceases as soon as the cargo is shipped." At the trial it was proved that the plaintiff was the real freighter. Held that the plaintiff was entitled to sue as principal, notwithstanding the terms of the charter-party.⁶ A., the mother and guardian of certain minors, in that capacity released certain real estate belonging to them to B. When one of the minors came of age he sued the administrator of B. in *assumpsit* for use and occupation, and it was held that as there was no privity between the minors and B., they could not maintain their action. In an action of trespass by the minors against B., it was held that B. was estopped by his plea in the former case from claiming a privity of contract, and he was adjudged a wrong-doer.⁷

SEC. 598. It has become a settled practice, in declaring in

¹ Picquet v. McKay, 2 Blackford, 465.

² Richmond v. Hays, 2 Penn. 492.

³ Dansen v. Johnson, 1 Greene, 264.

⁴ Hanson v. Buckner, 4 Dana, 251.

⁵ Bandit v. Bandit, 2 A. K. Marsh. 143; Keel v. Ogden, 3 Dana, 43.

⁶ Schmalz v. Avery, 3 Eng. Law & Eq., 391.

⁷ Hardy v. Williams, 11 Fred. 499.

an action upon a judgment, not, as formerly, to set out in the declaration the whole record of the proceedings in the original suit, but only to allege generally, that the plaintiff, by the consideration and judgment of that court, recovered the sum mentioned therein, the original cause of judgment having passed *in rem judicatum*. Objection that the court, in which judgment is rendered, has not jurisdiction over the subject matter of the suit, or that the judgment upon which suit is brought is absolutely void, may be pleaded in bar, or may, in some cases, be given in evidence, under the general issue, in an action brought upon the judgment. But the general rule is, that there can be no averment in pleading against the validity of a record, though there may be against its operation; and it is upon this ground that no matter of defense can be pleaded in such case which existed anterior to the judgment.¹ In the trial of a cause it is competent for either party to prove, by parol testimony, that the precise question in dispute was decided in a previous action between the same parties, and thus create an estoppel.²

SEC. 599. It is necessary to plead a judgment of a limited jurisdiction, but it cannot be pleaded in bar, or proved as an estoppel, while it is pending on appeal.³ A plaintiff is estopped from suing out a writ of error, on a judgment whereon he had caused an execution to be issued and returned satisfied in full, and his attorney's receipt in full endorsed thereon. He cannot treat the judgment as both right and wrong.⁴ Where, upon an appeal, a cause has been remanded, and the parties have made a voluntary settlement of the case by making mutual concessions, and have fully performed its stipulations, such agreement precludes a reconsideration of the case in the appellate court.⁵

SEC. 600. A defendant who has appeared and pleaded to the merits, is estopped from afterwards objecting to the jurisdiction of the court, on the ground of the insufficiency

¹ Biddle v. Wilkins, 1 Peters, 686.

² Rogers v. Libbey, 35 Maine, 200.

³ Keys v. Grannis, 3 Nev. 548.

⁴ Matlow v. Cox, 25 Texas, 583.

⁵ Jeter v. Jeter, 36 Ala. 391.

of the writ. So a general appearance of a defendant estops him from pleading any defect in the service. Any confession or admission made in pleading, in a court of record, whether it be express or implied, from pleading over without traverse, will forever preclude the party from afterwards contesting the same fact in any subsequent suit with his adversary.¹

SEC. 601. This doctrine at law gives rise to a kind of pleading that is neither by way of traverse, nor confession or avoidance, viz : a pleading, that waiving any question of fact, relies merely on the estoppel and after stating the previous act, allegation or denial, of the opposite party, prays judgment if he shall be received or admitted to aver contrary to what he before said or did. This is a pleading by way of an estoppel. In order to take advantage of the latitude thus given, and bring the estoppel of a judicial decision to bear on a point which it does not directly adjudge, requires the utmost certainty of allegation and proof. The proper course is to plead the judgment specially, fortifying it with the averments necessary to supply the vagueness of the record, and show that the precise question which is again agitated has been already determined. No estoppel will arise, unless this is made out with a clearness that leaves nothing to intendment or inference. A plea to an action of trover for a slave, that the defendant had sued for his hire in a former action, in which the right of ownership or title was in issue, and obtained judgment, will consequently be had on demurrer, because a man who hires a chattel from another, cannot dispute the title of his bailor, and the judgment may have been based upon the peculiar relation that the parties then held, and decided nothing further. When a record is presumptive in favor of the estoppel, less certainty will be required. So a general verdict.

SEC. 602. The burden of proof is on those who rely on the estoppel, and they must show that the matter for which the plaintiff sues has been already heard and determined. When however it is made to appear that a transaction has

¹ Com. Dig. Estoppel, A.

undergone a judicial investigation, the presumption will be irresistible that the judgment covered the whole, so far as it was entire and indivisible and cannot be overcome by the clearest proof that no evidence was given as to part by the plaintiff, or that the defendant failed to take advantage of a defense that might have been made available. A judgment for the plaintiff in an action of replevin, will be equally conclusive in his favor and against the defendant, whether the latter traversed the averment in the declaration that the goods were the plaintiffs, or confined himself to a denial of the taking and detention. In like manner, a recovery on the contract will preclude him from suing for any breach or default on the part of the plaintiff that would have constituted a bar as distinguished from a defense, by way of set-off or recoupment to the action. For when an act or contract is entire, and might be disposed of in one suit, the law will not suffer it to be divided or made the subject of distinct proceedings, and hence a defendant who suffers judgment to go against him for the price of machinery manufactured by the plaintiff cannot subsequently recover damages for an alleged want of care or skill in the workmen by whom the machinery was made.

SEC. 603. *Nil debet* cannot be pleaded to an action of debt on a judgment where the court rendering the judgment had jurisdiction.¹ A debt cannot be denied without denying the instrument on which it is founded. Hence a plea of *nil debet* is a bad plea in an action founded on a judgment. If it is desired to attack the judgment, the plea should be *nul tiel record*.² To *scire facias* on a judgment *nil debet* cannot be pleaded. The proper plea is *nul tiel record*, which puts in issue the fact whether notice to the defendant of the pendency of the suit was given.³ Where it appears from the record of a foreign judgment that process was served on the defendant, or that he appeared in the suit, the fact cannot be denied by plea. But the plea may show in what manner, whether by personal service or by attachment,

¹ French v. Lafayette Ins. Co., 5 McLean, 461.

² Armstrong v. Carson, 2 Dall. 302.

³ Bergen v. Williams, 4 McLean, 125.

notice was given, as this does not contradict the record, but limits its operation.¹

SEC. 604. Facts, in opposition to the record of a judgment obtained in one state, cannot be alleged to contradict the judgment, in an action brought upon it in another state. A judgment in one state is conclusive between the parties in another state.² The pleadings in an action are governed by the dignity of the instrument on which it is founded. If it is a record conclusive between the parties, it cannot be denied but by plea of *nul tiel record*. And when Congress, by the act of May 26, 1788, gave the effect of a record to the authenticated copy of the judicial proceedings of one state, in another, it gave all the collateral consequences, among which are, that, if conclusive between the parties, it cannot be denied only by that plea.³

SEC. 605. A plea of judgment recovered in a foreign court of competent jurisdiction must show that the judgment so recovered is final and conclusive between the parties according to the law of the place where such judgment is pronounced.⁴

SEC. 606. The discharge of a debtor under an act of bankruptcy is no estoppel to an action in any stage, unless it is pleaded.⁵ Where the matter on which an estoppel arises has not appeared in the preceding pleadings, it is unnecessary to plead it specially.⁶ In a plea of estoppel, every fact necessary to create the estoppel must be directly and precisely proved, and nothing is to be taken by inference. Thus, where a former decree in chancery on a bill brought by A., as administrator of the estate of B., was pleaded as an estoppel, and it appeared from the plea that A. claimed to be administrator, and as such brought his bill, and described himself as such throughout, but there was no direct averment that A. was in fact administrator, it was held,

¹ *Lincoln v. Tower*, 2 McLean, 473; *Thompson v. Emmert*, 4 Id. 96; *United States v. Little*, 3 Cranch, C. Ct., 251.

² *Fields v. Gibbs*, Pet. C. Ct. 155.

³ *Mills v. Duryee*, 7 Cranch, 481.

⁴ *Frays v. Womers*, 10 C. B. N. S. 149.

⁵ *Palmer v. Hutchins*, 1 Cow. 42; *Baker v. Taylor*, 2 Id. 165.

⁶ *Howard v. Mitchell*, 11 Mass., 241; *Adams v. Barnes*, 17 Id. 365.

that the plea was, for such cause, insufficient.¹ A party is not estopped by every averment made by the other side which he does not deny; but only by averment of facts material and traversable; alleged directly and precisely, and not by way of argument, inference or recital. Thus, where to an action of the sheriff against a surety on his deputy's official bond, the surety pleaded that on a certain day notice was given to the sheriff, by another surety, that he would no longer be responsible for the official conduct of the deputy, who became insolvent, and that the sheriff still carelessly and fraudulently continued him in office, and that all his defaults happened after such notice; to which the sheriff replied by alleging a breach previous to the notice, without denying or protesting against the other facts alleged, and had judgment upon a general demurrer to replication; it was held, in a *scire facias* for further execution, that the facts so stated in the plea, and not denied, did not constitute an estoppel, the fraud not being directly alleged, nor necessarily deducible from the other facts in the plea.²

SEC. 607. An estoppel by deed is to be made available in the same manner as the estoppel of a judgment of a court of record. It must be pleaded, if there is an opportunity, otherwise the party omitting to plead it waives the estoppel, and the jury must find according to the truth.³ If his adversary does not rely upon the estoppel, the court and jury are not bound by it; but the jury may find the matter at large according to the fact, and the court will give judgment accordingly. He asks them their opinion and they are bound to give it. Where, however, the title of the party is by estoppel, and he has no opportunity of pleading it, the jury cannot find against the estoppel. Thus, in debt for rent or an indenture of lease, if the defendant plead *nil debet*, he cannot give in evidence that the plaintiff had nothing in the tenements, because if he had pleaded that specially, the plaintiff might have replied the indenture, and estopped him; but if the defendant plead *nihil habuit*, &c., and the plaintiff, in-

¹ Crandall v. Gallup, 12 Conn. 365.

² Adams v. Moore. 7 Greenleaf, 86.

³ Trevivian v. Lawrence, Salkeld 276; Young v. Raincock, 7 C. B. 338.

stead of relying upon the estoppel, reply *habuit*, &c., he waives the estoppel, and leaves the matter at large; he puts the fact in issue; and the jury are to find the truth notwithstanding the indenture.¹ But when an estoppel creates an interest in lands, the court will adjudge accordingly upon the facts found by the jury. As if A. lease land, in which he has no interest, to B. for six years, and then purchase a lease of the same lands for twenty-one years, and afterwards lease to C. for ten years, and these facts are found by verdict, the court will adjudge the lease in B. to be good, though it was so only by the conclusion.² If a plaintiff in ejectment make title by a judgment, in a *scire facias*, on a judgment in Trinity term, where the judgment was in fact of Michaelmas term, the jury cannot find that the original judgment was of Michaelmas term.³

SEC. 608. If a woman sue or be sued as sole, and judgment be against her as such, though she was covert, the sheriff shall take advantage of the estoppel.⁴

In other cases, where the party who might have relied on the estoppel, in pleading, waives it, and gives the deed in evidence, although the jury are not bound by the estoppel from finding according to the truth of the fact, yet it seems that they would not be warranted in finding a verdict contrary to the solemn admission of the party, without the strongest evidence of fraud. As, for instance, before the rules of Hilary Term, 1834, in an action of *assumpsit*, where the defendant pleaded the general issue, and gave in evidence a release which he might have relied upon as an estoppel; although he waived the estoppel, still the release was considered to be conclusive evidence for the defendant, in the absence of fraud.

Though one mortgaging a water privilege with general warranty is estopped by the deed to deny the mortgagee's title, yet if it be agreed in a case stated, that nothing passed by the deed, the estoppel is removed.

¹ Com. Dig. Estoppel, c.; ib. Pleader, S. 5; Buller's N. P. 298.

² Com. Dig. Estoppel E. 10.

³ Trevivan v. Lawrence, Salk. 276.

⁴ Wheelock v. Henshaw, 19 Pick. 341.

SEC. 609. An estoppel effecting the title to land may be given in evidence.¹ But only a sealed instrument can be pleaded by way of an estoppel.² And if it is not so pleaded it will be considered as waived.³

No instrument in writing not under seal can be pleaded as an estoppel. The manner of pleading an estoppel, is to rely on the deed as an estoppel, and pray judgment that the party be estopped, or not admitted to deny the facts which the deed purports, without demanding judgment, *si actio*, etc., etc.⁴

SEC. 610. There are cases in which the defendant is not permitted to controvert the title of the claimant in an action of ejectment on the ground of *estoppel*, or where a privity exists between the defendant and the plaintiff, or those from whom he derives title. If a privity in estate has subsisted between the parties, proof of title is ordinarily unnecessary on the part of the plaintiff, for the reason that a party is not permitted to dispute the title of him by, when he has been let into possession. In all these cases, therefore, the proof is directed to the question as to whether such relation exists between the parties as to operate as an estoppel, and thereby supersedes the necessity of introducing any evidence to establish the title of the claimant. The principle of estoppel arises where the action is between mortgagee, mortgagor, their privies or assigns. A landlord who brings an action against a tenant, is in no case obliged to prove his title to the demised premises, for the landlord's title is admitted by a tenant who takes a lease from him, and on the faith of the lease occupied the premises. And where rent has been paid to a tenant for life, the same rule applies, and he will not be permitted to dispute the title of the revisioner. In these cases, the plaintiff is not required to make proof of his title.⁵ No third title can be purchased by an agent or a tenant, and made use of to defeat that of

¹ Adams v. Barnes, 17 Mass. 365.

² Davis v. Tyler, 12 Johns. 490.

³ Brinsmaid v. Mayor, 9 Verm. 31.

⁴ Davis v. Tyler, 12 Johns. 490.

⁵ Doe v. Whitroe, Dow. & Ryl. N. P. C. 1; Rennie v. Robertson, 1 Bing. R. 147; Tilghman v. Little, 13 Ill. R. 239.

the landlord. If the tenant, after renting the premises, acquires rights adverse to his landlord, he is bound to surrender the property before he can be permitted to assert them.¹

SEC. 609. He who claims title by estoppel is, as to those estopped, in the constructive possession of the land, and may maintain trespass.² Where a party claims to establish his right merely by estoppel, the instrument by which the estoppel is supported should be precise, clear and unequivocal, not depending upon doubtful inference. In a real action a disclaimer estops the tenant denying the title set forth in the demandant's writ,³ but he may show that the lessor's title has expired. And if he is evicted and deprived of the use and enjoyment of the demised premises by some person claiming by title paramount, the eviction is pleadable in bar to the demand for the rent. Where the matter which constitutes an estoppel is set up in the declaration, the plaintiff may demur to a plea which attempts to set up the same matter as a defense. But if such matter does not appear on the face of a declaration, the plaintiff must, by a replication, expressly show such matter, and rely thereon.⁴ An estoppel cannot be taken by inference, but must be relied on in the pleadings.⁵ If the matter is not expressly and precisely alleged, it will be no estoppel.⁶ Where a party relying on a matter in estoppel has no opportunity of pleading it as a landlord relying on his lease in ejectment, he may give it in evidence with the same effect as if pleaded.⁷

SEC. 610. Whenever the application of the doctrine of estoppel would be likely to defeat the principle upon which it rests, to effect justice and prevent wrong, it becomes the duty of the courts to prevent its application. But to be available where there is more than one party, they must be mutual, and can only operate upon the parties to the issue and those who stand in privity of estate or descent, and one

¹ Brown v. Keller, 32 Ill. R. 151; Russell v. Titus, 3 Grant's Cases, 294

² Phelps v. Blount, 2 Dev. 177.

³ Prescott v. Hutchinson, 13 Mass. 439.

⁴ Smith v. Whittaker, 11 Ill. 417.

⁵ Lansing v. Montgomery, 2 Johns. 382.

⁶ Guild v. Richardson, 6 Pick. 364.

⁷ Lord v. Bigelow, 8 Vt. 461.

who is not bound by cannot take advantage of an estoppel, an estoppel must be reciprocal and certain to every intent binding both parties, a defendant in an action of covenant is estopped from pleading that the contract was entered into for any fraudulent purpose against the government,¹ a jury is bound by an estoppel, and a court will disregard a finding contrary thereto, except where the party has waived his rights by mispleading.² In debt on bond, the defendant pleaded that the same was obtained³ by false suggestions and misrepresentations by the plaintiff, "as per preamble in the said bond."⁴ The plaintiff joined issue as to that fact, which was found against him by the jury. Held, that the plaintiff, by joining issue and not demurring, had waived any estoppel which he might have had to such plea.⁵

SEC. 611. In regard to estoppels *in pais* or equitable estoppels, there is a remarkable difference between this and other kinds of estoppels, that is, that estoppels *in pais* may be relied on in evidence as conclusive without being specially pleaded, and from some of the reported English cases it seems that it is optional either to plead specifically the facts out of which the estoppel arises, or to allege and deny, as the case may be, that which those facts conclude the opposite party from denying or alleging, and rely at the trial upon the matter *in pais* which creates the estoppel, as being conclusive evidence of such allegation or denial. A party setting up an equitable estoppel, or *in pais*, is himself bound to the exercise of good faith and due diligence to ascertain the truth. What is reasonable diligence, is a question of fact for the jury, under all the circumstances of the case. They might sometimes find that the party setting up such estoppel could reasonably rely on the representations made to him, without injury.⁶ The facts constituting an estoppel *in pais* against a plaintiff, must be set out in the answer, otherwise proof of them is not admissible.⁷

¹ Philpots v. Philpots, 2 Eng. L. & Eng. 339.

² Bufferlow v. Newsom, 1 Dev. 208.

³ Wright v. Hazen, 24 Vt. 143.

⁴ Ghew v. Moffet, 6 Munf. 120.

⁵ Black v. Tucker, 12 Vt. 44.

⁶ Moore v. Bowman, 47 N.H. 494.

⁷ Gill v. Rice, 13 Wis. 385; Wood v. Ostram, 29 Ind. 177.

SEC. 612. The origin of this branch of estoppels being purely equitable, the remedy in such cases were in an application to chancery, and no redress could be obtained at law unless under rare and exceptional circumstances.¹ But the common law has been enlarged and enriched with the principles and maxims of equity which are constantly applied at the present time, both in England and America, for the relief of sureties, the protection of mortgagors, and benefit of purchasers, by a wise adaptation of ancient forms to the more liberal spirit of modern times.

SEC. 613. The application of equitable estoppels by courts of equity is to every species of property, and there can certainly be no reason for restricting its operation by courts of law, the necessity of protection against fraud, no matter what the interests are or may be that are at stake. There is nothing in the nature of real estate, whether the action be at law or in equity, which should deprive it of the benefit of those wise and salutary principles which are applied without hesitation in both jurisdictions in the case of personalty. The doctrine of equitable estoppels has become too firmly established to question at this day the wisdom of the change which released it from the exclusive equity jurisdiction of former times, enlarging its operation to the whole field of jurisprudence.² In one case³ it was held that the application of equitable estoppels to the title of land is not a variance with the interpretation which has invariably been given to the statute of frauds, in equity, and that it is essentially necessary to the administration of the common law, while in some of the southern states⁴ it is held that the only remedy lies in equity. The doctrine of equitable estoppels is one which at the present time can be applied at law to real and personal property without forcing the parties to seek relief in equity, and as between co-ordinate powers neither can lessen the power of the other by arrogating them to itself;

¹ *Tilton v. Nelson*, 27 Barb. 595.

² *Burkhalter v. Edwards*, 16 Geo. 593; *Merrett v. Home*, 5 Ohio, 307; *Shaw v. Beebee*, 35 Vt. 204.

³ *Rangely v. Spring*, 28 Maine, 127.

⁴ *Dunley v. Rector*, 5 Eng. 211; *West v. Tilphman*, 9 Ired, 163; *Jones v. Susser*, 1 Dev. & B., 462.

the appropriation of the doctrines of equity by the common law will not estop the right to seek redress by an application in due form to chancery.¹

SEC. 614. Whether declarations were made or a course adopted of a nature to mislead others, and how far the latter were actually deceived, are questions of fact which must be submitted to a jury when the suit is brought in a court of law.² But the court should at the same time declare what the elements of an equitable estoppel are, and if they are present, the conclusion will follow as a matter of law.³ Thus where the owner of real or personal property says or does that which necessary tends to convey the impression that he has no title or means to waive the title which he has, the presumption that subsequent purchasers were influenced by his conduct will, in the absence of rebutting testimony, be irresistible and will be enforced as a matter of law.⁴ Where good faith is a necessary ingredient in the issue, and there can be no estoppel unless there was a design to mislead, the decision should be left to the jury, who are under all circumstances the appropriate tribunal to determine between honesty and fraud, and in one case,⁵ the question whether the silence of the plaintiff had estopped him from asserting his title was said to be one which the court could not decide, and must leave with proper instructions to the jurors.

SEC. 615. There are few more difficult questions than those which arise when a bond or deed is executed on the faith of a promise that it shall be subject to a qualification or condition inconsistent with its terms. In such cases the principle that a sealed instrument shall not be varied by parol evidence, is brought in antagonism with the equitable one that a promise on the faith of which others have acted cannot be recalled, and it is not always easy to draw the line between them, or know how far the one shall be allowed to modify the operation of the other. It has, however,

¹ *The Wesley Church v. Moore*, 10 Penn. 273; *Wells v. Pierce*, 27 N. H., 503; *Corbett v. Norcross*, 35 N. H., 99.

² *Forsyth v. Day*, 46 Me. 176; *Allen v. Gove*, 41 N. H. 465; *Green v. Bates*, 6 Cal. 263.

³ *Lewis v. Carstairs*, 6 Wharton. 207.

⁴ *Robinson v. Justice*, 2 Penn. 19; *Keeler v. Vantuytle*, 6 Penn. 250.

⁵ *Green v. Bates*, 6 Cal. 263.

been held in Pennsylvania, and that state has gone farther than any other on this point, that when the promise and instrument differ, the promise must prevail, if the evidence justifies the belief that the instrument would not have been executed but for the promise.¹ Where the promise can be proved, the course of decisions would be eminently just, because it would appear that the writing did not contain the whole contract, and that the meaning of the parties must be sought elsewhere.² It is difficult to reconcile these decisions with the well established principles of equity and justice, that where the contract is reduced to writing, the writing is not only the best, but the only evidence of the contract, which was intended to give stability to the transactions of life, by enabling men to put their acts and agreements in a form that should be beyond the reach of the uncertainty incident to oral testimony, and would be of comparatively little value if witnesses could be called to prove that stipulations omitted, with the knowledge and assent of both parties, were, notwithstanding, meant to be as binding as if they had been set forth in terms.³

SEC. 616. The weight of authority is decidedly in favor of holding, that a man who is so ill advised as to execute a written contract, in reliance on a promise that it shall not be literally enforced, must submit to the loss if he is deceived, and that he cannot ask that a principle of great moment to a community, shall be made to yield for the sake of relieving him from the consequences of his own indiscretion.⁴ But this does not apply to those cases when the writing accidentally fails to express the agreement, and where it is executed in ignorance of the mistake. For where the variance is not known, neither party can be charged without wilfully exposing himself to the consequences. Under these circumstances parol evidence is admissible in equity to prove

¹ Chalfant v. Williams, 35 Penn. 212; Taylor v. Gilmore, 25 Vt. 411; Kisselbrack v. Livingston, 4 Johns. Ch. 144; Renshaw v. Gaus, 7 Penn. 119.

² Thurston v. Ludwig, 6 Ohio State, 1.

³ Fulton v. Hood, 34 Penn. 365; Wheelton v. Hardisty, 8 Ellis & B. 232.

⁴ Wilson v. Watts, 9 Md., 355; Allen v. Spurr, 8 Allen, 412; Howard v. Thomas, 12 Ohio S., 201.

the mistake, and to show in what particulars the contract actually entered into, differs from that reduced to writing.¹

SEC. 617. Courts of equity exercise this branch of jurisdiction with much caution, and refuse relief unless the grounds on which it is sought are clear and unequivocal.²

The question arose in an insurance case,³ where it was said that the plaintiff could not show that he had effected the insurance on the faith of a promise by the agent of the insurers, that the policy should not be vitiated by the inaccuracy of the survey, because this would be in direct opposition to the warranty contained in the policy; but he was permitted to show that the agent of the insurance company prepared the survey, and was thus excluded from the warranty, the presumption of which was, that the warranty referred to the act of the insured, not the insurers. But when the peculiar nature of the case, or from the circumstances, it can be shown in accordance with the established rules of evidence, that the contract cannot be enforced, as it stands, without a breach of faith, relief may be granted in equity, or under the principles of equitable estoppel at law.⁴

SEC. 618. The estoppel in pais, as applied to mercantile transactions, may be taken advantage of by a plea containing the necessary averments, and concluding with a prayer, whether the defendant shall be admitted to say that the bill which he has accepted, was not made by the party whose name is affixed as drawer.⁵ Estoppels *in pais* are not pleaded, but are in general, given in evidence, and will, *prima facie*, operate as effectually to estop the party under the direction of the court.⁶

SEC. 619. Equitable estoppels growing out of acts *in pais*,

¹ McCann v. Letcher, 8 B. Mon., 320; Willian v. Willian, 16 Vesey, 72; Bellas v. Stone, 14 N. H., 175; Brown v. Brown, 8 Leigh., 1; Worden v. Haviland, 18 Conn., 101; Langdon v. Keith, 9 Vt., 299; Lancker v. Rex, 20 Penn., 464; Larkins v. Biddle, 21 Ala., 557; Jack v. Fulton, 3 Gratt., 193; Ross v. Wilson, 7 S. & M., 783.

² Hall v. Claggett, 2 Md. Ch., 153; Philpot v. Elliott, 4 Md. Ch., 273.

³ Plumb v. Cattaraugus M. Ins. Co. 18 N. Y. 385; Chaffee v. Same, *ib.* 376.

⁴ Wood v. Dwarries, 11 Exch. 493.

⁵ Sanderson v. Coleman, 8 M. & W. 209.

⁶ Welland Canal v. Hathaway, 8 Wend. 480; Reed v. Pratt, 2 Hill, 64; People v. Bristol and Rensselaer Turnpike Co., 23 Wend. 222.

constitute an exception to the general rule, and are equally conclusive whether pleaded or given in evidence. This is peculiarly true, if estoppels *in pais*, which generally arise out of a great variety of circumstances that cannot well be set forth with the precision and brevity required for good pleading.

SEC. 620. In Alabama it is held that the bar of an equitable estoppel falls when land is in question, within the jurisdiction of chancery, and cannot be set up by a mere legal tribunal.¹ But in many other states the estoppel arising from fraud and misrepresentation of the title to land, is a good defence at law.² Nor need they in certain cases be pleaded in order to make them obligatory. Where one party read a deed in evidence, signed by certain persons as executors, it was held to operate as an admission that they were such executors in lieu of proof to that effect by the other party.³ A court of equity will enjoin a party from setting up an unconscientious defence at law, or from interposing impediments to the just rights of the other party.⁴

SEC. 621. A party who sets up an estoppel *in pais* as a bar to receiving evidence contrary to the representation made to him by another, must show that there was a wilful intent to make him act on the faith of the representation, and that he did so act.⁵ Estoppels, whether claimed as of record or *in pais*, must, to be such, be within the principle which gives them force before they will be effectual.⁶

¹ Walker v. Murphy, 34 Ala. 591; Smith v. Mundy, 18 Ala. 182.

² Nixon v. Carco, 28 Miss. 414; Thompson v. Sanborn, 11 N. H. 201; Brown v. Wheeler, 11 Conn. 345; Reed v. Bensley, B. Mon. 254; Hamilton v. Hamilton, 4 Penn. St. 193; Shepley v. Rangley, 2 N. & M. 213.

³ Walton v. Newsom, 1 Humph. 140.

⁴ 2 Story Eq. § 903; McPherson v. Walters, 16 Ala. 714; Walker's Heirs v. Murphy, 34 Ala. 591; Smith v. Mundy, 18 Ala. 182; Stone v. Britton, 22 Ala. 543.

⁵ Andrews v. Lyon, 11 Allen, 349.

⁶ McKennahan v. Crawford, 59 Penn. St. 390.

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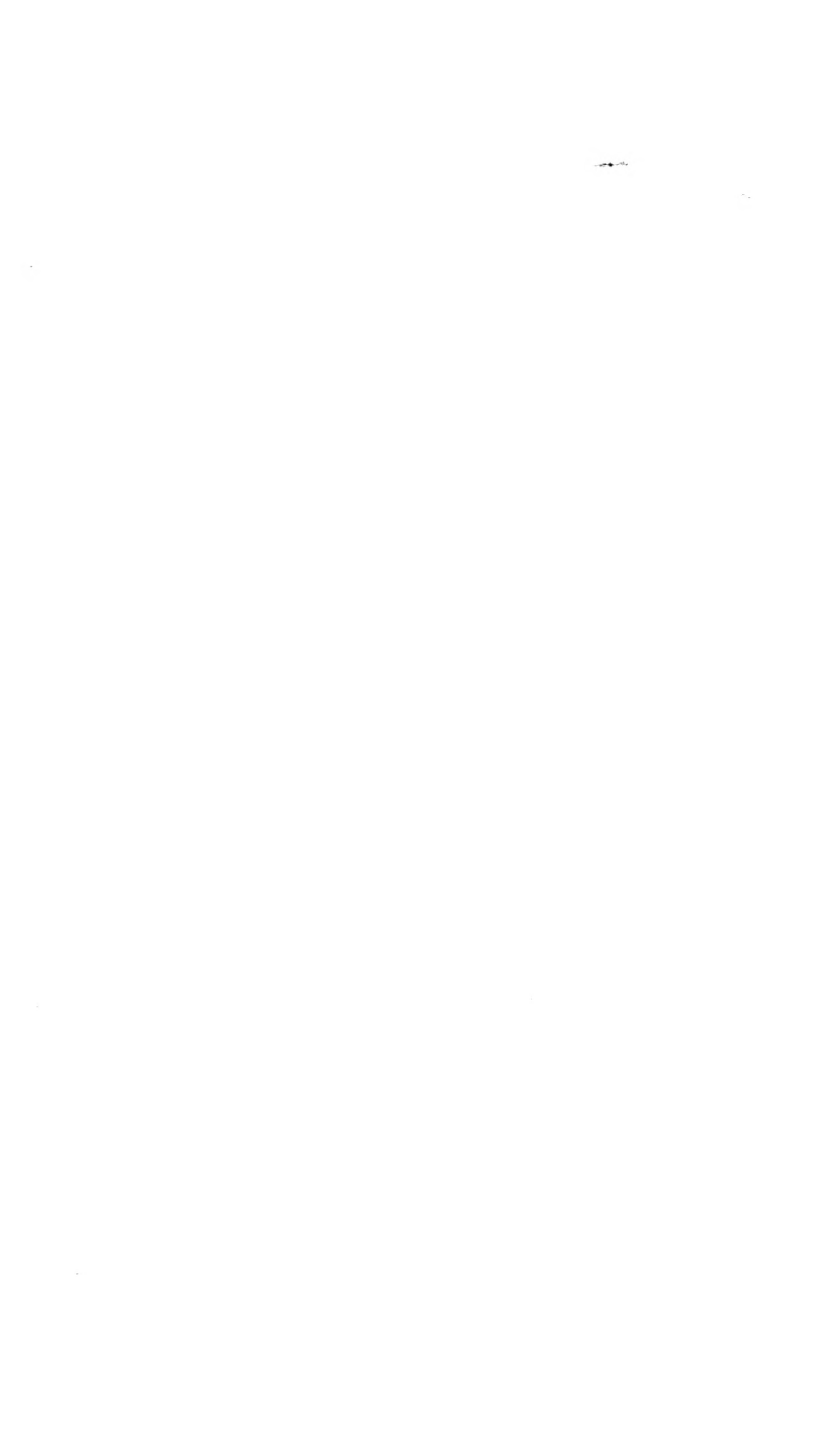
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